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No. 11593

United States Circuit Court of Appeals

For the Ninth Circuit.

J. GERBER HOOFNEL,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Transcript of the Record

Upon Petition to Review a Decision of the Tax Court of the United States

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Rotary Colorprint, 870 Brannan Street, San Francisco 6-4-47—60

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

APPEARANCES

For Taxpayer:

ROBERT A. WARING, ESQ.

For Commissioner:

A. J. HURLEY, ESQ.

Docket No. 9117

J. GERBER HOOFNEL,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DOCKET ENTRIES

1945

Sept. 10—Petition received and filed. Taxpayer notified. Fee paid.

Sept. 10—Copy of petition served on General Counsel.

Sept. 10—Request for hearing at Los Angeles, California, filed by taxpayer. 9/20/45. Granted.

Nov. 2—Answer filed by General Counsel.

Nov. 6—Copy of answer served on taxpayer. Los Angeles, California.

1946

Apr. 8—Motion to advance hearing to 6/10/46 filed by taxpayer. 4/11/46 Granted.

Apr. 16—Hearing set 6/10/46, Los Angeles, California.

June 20—Hearing had before Judge Black on merits. Stipulation of facts filed. Briefs due 8/5/46. Replies 9/5/46.

July 8—Transcript of hearing 6/20/46 filed.

Aug. 5—Motion for extension of time to 8/30/46 to file brief, filed by General Counsel. 8/6/46 Granted.

1946

Aug. 5—Brief filed by taxpayer. 9/3/46 Copy served.

Aug. 30—Brief filed by General Counsel. Copy served 9/3/46.

Nov. 12—Findings of fact and opinion rendered, Judge Black. Decision will be entered for the respondent. Copy served.

Nov. 13—Decision entered. Judge Black, Div. 15.

1947

Feb. 10—Petition for review by U. S. Circuit Court of Appeals, 9th Circuit, with assignments of error filed by taxpayer.

Feb. 12—Proof of service of petition for review filed. (Tax Court.)

Feb. 12—Proof of service of petition for review filed. (Taxpayer.)

Mar. 21—Stipulation of Venue filed.

Mar. 26—Statement of points and designation of parts of record to be printed, with proof of service thereon, filed by taxpayer.

Mar. 26—Agreed statement of evidence filed by taxpayer.

Mar. 26—Designation of record with agreement and proof of service thereon filed.

Apr. 8—Certified copy of an order from the 9th Circuit extending time to May 1, 1947, to prepare and transmit the record filed.

The Tax Court of the United States

Docket No. 9117

J. GERBER HOOFNEL,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Internal Revenue Agent In Charge in his notice of deficiency (Bureau Symbols LA:IT:90D:PAK) dated August 31, 1945, and as a basis of his proceeding alleges as follows:

1. The petitioner is an unmarried individual with residence in Los Angeles, California, care of Robert A. Waring, 412 West Sixth Street, Los Angeles, California. The return for the period here involved was filed with the collector for the sixth district of California.

2. The notice of deficiency (a copy of which is attached and marked Exhibit A) was mailed to the petitioner on August 31, 1945.

3. The taxes in controversy are personal income taxes for [2*] the taxable year ending December 31, 1943, and in the amount $1311.01 of which

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* Page numbering appearing at top of page of original certified Transcript of Record.

$1162.01 is in dispute. There is no dispute as to the tax on $1418.59 received in 1942 for personal services rendered in the United States at Burbank, California, prior to June 30, 1942, for Vega Aircraft Corporation and Lockheed Overseas Corporation which tax amounts to $149.00 and has been paid by the taxpayer.

4. The determination of tax set forth in said notice of deficiency is based upon the following errors:

(a) In determining the taxable net income of petitioner for the year 1942, the Commissioner and Revenue Agent in Charge erroneously included the sum of $2600.00 earned by taxpayer while a bona fide resident overseas.

(b) In determining the net income for the year 1943, the Commissioner and Revenue Agent In Charge erroneously included the sum of $5,262.50 earned outside of the United States by taxpayer while a bona fide resident of North Ireland.

5. The facts upon which petition relies as the basis of this proceeding are as follows:

(a) That at all times during the periods in question taxpayer J. Gerber Hoofnel was a bona fide resident of the British Isles and North Ireland within the meaning of the Revenue Code, particularly Sec. 116 thereof, and as the term resident is defined in Regulations 111, Section 29.211-2 thereof.

He embarked at New York City June 30, 1942, on H.M.S. Maloja, bound for and arriving at the British Isles July 12, 1942. [3] He thereupon resided in the British Isles and North Ireland until his return to the United States in 1944, leaving the British Isles June 30th of that year and arriving in New York City July 12, 1944, on U. S. S. Hermitage.

It was his intention when he entered the employ of Lockheed Overseas Corporation to continue with them overseas for the duration of the war and as long thereafter as necessary for their performance of their agreements with the United States Army; he so committed himself in his application to the corporation before going overseas, and in May, 1943, he further signed a contract with said corporation confirming this understanding; and at no time during said period did he or could he have any definite intention to return to the United States and in fact the then hazards of the war made it uncertain whether or not he might ever be able to return to the United States.

Wherefore, petitioner prays that this court may hear the proceedings and determine that there is no deficiency due from petitioner for the year ending December 31, 1943 (including therein any deficiency for the year 1942).

/s/ ROBERT A. WARING,
Counsel for Petitioner. [4]

State of California,
County of Los Angeles—ss.

J. Gerber Hoofnel, being duly sworn, says that he is the petitioner above named; that he has read the foregoing petition and is familiar with the statements contained therein, and that the statements contained therein are true, except those stated to be upon information and belief, and that those he believes to be true.

J. GERBER HOOFNEL.

Subscribed and sworn to before me this 7th day of Sept., 1945.

MYRA BARNES DAY,
Notary Public. [5]

EXHIBIT A

15
417 South Hill Street.
LA:IT:90D:PAK Aug. 31, 1945.

Mr. J. Gerber Hoofnel,
501 South Ardmore Avenue,
Los Angeles 5, California.

Dear Mr. Hoofnel:

You are advised that the determination of your income and victory tax liability for the taxable year ended December 31, 1943, discloses a deficiency of $1,311.01, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency mentioned.

Within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day) from the date of the mailing of this letter, you may file a petition with The Tax Court of the United States, at its principal address, Washington, D. C., for a redetermination of the deficiency.

Very truly yours,

JOSEPH D. NUNAN, JR.,
Commissioner.

/s/ By RAYMON B. SULLIVAN,
Acting Internal Revenue
Agent in Charge.

PAK:vsc
Enclosure
Statement [6]

Statement

LA:IT:90D:PAK

Mr. J. Gerber Hoofnel
501 South Ardmore Avenue
Los Angeles 5, California

Tax Liability for the Taxable Year
Ended December 31, 1943

	Deficiency
Income and Victory Tax	$1,311.01

In making this determination of your income and victory tax liability careful consideration has been given to the report of examination dated January 25, 1945, to your protest dated March 2, 1945, and to the statements made at the conferences held.

It is held that compensation in the amount of $1,418.59 received by you during the year 1942 for personal services rendered in the United States for Vega Aircraft Corporation and Lockheed Overseas Corporation, and compensation in the amounts of $2,600.00 and $5,262.50 received by you in 1942, and 1943, respectively, for services rendered while temporarily employed in Northern Ireland by Lockheed Overseas Corporation, represent taxable income under the provisions of Section 22 of the Internal Revenue Code, as amended.

It is held further that all earnings during your temporary employment in Northern Ireland may not be excluded from gross income under section 116 of the Internal Revenue Code, as amended.

Adjustments to Net Income
Taxable Year Ended December 31, 1942

You filed a return on form 1040A for the period January 1, 1942, to June 30, 1942, disclosing a net income of $1,420.59. A return on form 1040 was filed for the period July 1, 1942, to December 31, 1942, which discloses no net income. Inasmuch as a return was not filed for the taxable year ended December 31, 1942, your net income has been determined as follows:

(a) Salary received	$4,018.59	
(b) Dividends received	2.00	
Net Income determined		$4,020.59

Statement shows total income tax of $690.41 on above 1942 income. [7]

Adjustments to Net Income
Taxable year ending December 31, 1943

Income:		
(a) Income from salary		$5,262.50
(b) Income from dividends		4.00
Total		$5,266.50
Deductions:		
(a) Contributions		92.00
Net Income for 1943		$5,174.50
Income Tax	$ 964.32	
Victory Tax	174.09	
Unforgiven 1942 Tax	172.60	
Deficiency	$1,311.01	

Received and filed Sept. 10, 1945. [8]

[Title of Tax Court and Cause.]

ANSWER

The Commissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer, admits and denies as follows:

1 and 2. Admits the allegations contained in paragraphs 1 and 2 of the petition.

3. Admits that the taxes in controversy are personal income taxes for the taxable year ending December 31, 1943; denies the remainder of the allegations contained in paragraph 3 of the petition.

4. Denies the allegations of error contained in subparagraphs (a) and (b) of paragraph 4 of the petition.

5. Denies the allegations contained in paragraph 5 of the petition. [9]

6. Denies each and every allegation contained in the petition not hereinbefore specifically admitted or denied.

Wherefore, it is prayed that the determination of the Commissioner be approved.

/s/ J. P. WENCHEL—ECC
Chief Counsel, Bureau of Internal Revenue.

Of Counsel:

B. H. NEBLETT,
Division Counsel.
E. C. CROUTER,
A. J. HURLEY,
Special Attorneys, Bureau of Internal Revenue.

AJH/mm 10/23/45.

Received and filed Nov. 2, 1945. [10]

[Title of Tax Court and Cause.]

STIPULATION OF FACTS

To the Tax Court of the United States:

It is hereby stipulated and agreed, by and between the parties hereto, by their respective counsel, that

the following facts shall be taken as true, without prejudice to the right of either party to introduce other and further evidence not inconsistent therewith:

1. From January 1 to June 30, 1942, petitioner J. Gerber Hoofnel was employed as a Secretary in the United States by Vega Aircraft Corporation and Lockheed Overseas Corporation, of Burbank, California.

2. On or about February 18, 1942, he made out and signed a formal application for overseas employment by Lockheed Overseas Corporation, a true and correct copy of which application is attached hereto and made a part hereof as Exhibit 1. In connection with such employment, petitioner in May of 1942 signed a contract [11] with Lockheed Overseas Corporation in which he agreed to perform services for that company at aircraft depots operated by it in North Ireland, a true and correct copy of which contract is attached hereto and made a part hereof as Exhibit 2.

3. Pursuant to his employment and said contract, J. Gerber Hoofnel, on June 30, 1942, embarked on His Majesty's Steamship Maloja, a vessel of British registry. The Maloja sailed from New York harbor early on the morning of July 1, 1942, bound for the British Isles.

4. Pursuant to his employment and said contract above mentioned, the expiration date of said contract was extended by agreement of the parties

to it until May 1, 1943, at which time he entered into a new contract with Lockheed Overseas Corporation, a true and correct copy of which is attached hereto and made a part hereof as Exhibit 3. The petitioner remained in the employ of Lockheed Overseas Corporation stationed at a base in Northern Ireland until July 13, 1944, at which time he returned to the United States.

5. Petitioner received as compensation for personal services rendered to Lockheed Overseas Corporation in Northern Ireland during the year 1942, the sum of $2,600.00 and during 1943 the sum of $5,262.50, of which 90% of said amounts was deposited by said Lockheed Overseas Corporation to the account of the petitioner with the Bowling Green Trust Co., Bowling Green, Kentucky, pursuant [12] to the provisions of the contract of employment.

6. On October 9, 1944, petitioner filed income tax returns for the period June 30, 1942, to January 1, 1943, and for the taxable year 1943 with the Collector of Internal Revenue for Baltimore, Maryland, in which returns the petitioner excluded from his gross income the aforesaid amounts of $2,600.00 and $5,262.50, respectively, on the ground that during the period from June 30, 1942, to January 1, 1944, the petitioner was a bona fide resident of a foreign country within the meaning of Section 116 of the Internal Revenue Code.

7. The petitioner did not at any time make any application to become a citizen of Northern Ireland, or a British subject. During the years 1942

and 1943, petitioner was domiciled in the United States.

/s/ ROBERT A. WARING,
Counsel for Petitioner.

/s/ J. P. WENCHEL, ECC
Chief Counsel, Bureau of
Internal Revenue,
Counsel for Respondent.

Filed June 20, 1946. [13]

Occupation Best Qualified for, By Code No. 372 1. 322 2. Placement Division

( ) 1 2 3 ( ) A B C

APPLICATION FOR FOREIGN SERVICE

Name HOOFNEL, JOHN GERBER Clock No. 37243 Occup. Code 372-2 Senior Steno. Dept.&Shift Dept.#39-Shift: Day
Print Last First Middle

Present Address 501 S.Ardmore, Los Angeles, California Phone EXposition 7244--or leave message--EXposition 1639
Number Street City

Are you willing to go to any part of the world? Yes For how long? 1 year__ 2 years__ Longer X

Do you understand your services may be in a war combat zone and travel to this point will be hazardous? Yes

Do you understand you may not Take your wife or any member of the family? Yes

Mr. & Mrs. John P. Hoofnel, 525 Park St., Bowling Green Ky.(Parents) -Dont know 'phone No./ but they have a phone
Name, Address, Telephone No., and Relation of Person to be Notified in Emergency

Will you submit to rigid medical examination Yes Inoculation? Yes

Race	Color of hair	Color of eyes	Height	Weight	Present age	Length of residence in L.A. Co.	What cities
White	Dark Brown	Blue	6'¼"	150	40	Approx. 12 years	Los Angeles

Draft Classification None Local Board No. - City - State - S.S.No. -

What military or naval experience? None Final Rating -

What foreign languages do you speak and/or read? None

A and/or E License - Other C.A.A. Ratings -

What foreign country have you lived in? None For how long? -

What special qualifications, Lockheed service, etc., have you?

(SEE ATTACHED PAGE)

EXHIBIT No. 2

Secret

Agreement of Employment

Agreement made this ..... day of ....., 1942, by and between Lockheed Overseas Corporation, a Delaware corporation with its principal place of business in Burbank, California, and (hereinafter sometimes referred to as Employee), an individual residing at .....

Recitals

A. Pursuant to a certain Letter of Intent from the War Department of the United States of America (hereinafter sometimes referred to as the Government), Lockheed Aircraft Corporation, a California corporation with its principal place of business in Burbank, California, (herein called Lockheed), and the Government have entered into a contract for the organization, equipment, and operation of an aircraft depot outside the continental limits of the United States.

B. For the purpose of expediting the performance of such work, Lockheed Overseas Corporation, a wholly owned subsidiary of Lockheed, has accepted designation as major subcontractor under the above mentioned contract and has entered into a subcontract with Lockheed under which Lockheed Overseas Corporation has undertaken to organize, equip, and operate said aircraft depot. Said contract and subcontract (hereinafter for convenience

referred to collectively as the Government contract) are subject to extension of the term thereof and subject to termination by the Government under the terms and conditions therein set forth. The subsidiary, Lockheed Overseas Corporation, is hereinafter referred to as Contractor.

C. Contractor desires to employ Employee for work in connection with the organization, equipping, and operation of said aircraft depot; and Employee desires to accept such employment in accordance with the terms and conditions contained herein.

D. Employee understands that he may and probably will be called upon to render services hereunder in a war combat zone in a foreign country or countries under relatively difficult living and working conditions, and that travel of Employee may be subject to the dangers of war and travel by land, sea, and air.

Agreement

In consideration of the premises, the mutual covenants and promises herein contained, and for other good and valuable considerations, the parties hereto agree as follows:

Article 1. Time and Duration of Employment

Contractor employs Employee to render service in connection with said aircraft depot with such duties as reasonably may be assigned to him, and Employee accepts such employment with knowledge

of the conditions recited above. Subject to the terms and conditions hereinafter set forth, Employee's employment hereunder shall commence when he reports for duty at a point [15] within the United States to be designated by Contractor, at the time and place designated by Contractor, and shall continue until November 1, 1942, or such later date as may be agreed upon and thereafter until sixty (60) days after return transportation to the United States is made available by Contractor, it being understood that such return transportation shall be made available on November 1, 1942, or the later date agreed upon or as soon thereafter as is practicable under the circumstances then existing.

Article 2. Amount, Time and Mode of Payment of Salary

Employee's salary as long as he remains employed hereunder shall be at the rate of ..... dollars per month, lawful money of the United States (sometimes hereinafter referred to as foreign salary) payable semi-monthly, in United States Dollars except as hereinafter stated, provided however, that Employee's salary while employed hereunder in the United States shall be at the rate of sixty per cent (60%) of the foreign salary.

Unless otherwise approved by Contractor, the salary payable to Employee while employed hereunder outside of the United States (less any lawful deductions including any amounts paid to Employee by Contractor at Employee's place of duty), shall be deposited for the account and at the risk of

Employee in a bank in the United States to be designated by Employee or, in the absence of such designation, in a member bank of the Federal Reserve System to be selected by Contractor, and a duplicate deposit slip or receipt of such bank shall constitute conclusive evidence of payment to Employee.

Contractor shall pay to Employee at his place of duty from time to time, amounts which shall not in the aggregate exceed during any one (1) month, ten per cent (10%) of Employee's salary for such month, payable in pounds sterling or United States dollars, at the sole discretion of the Contractor, but the foregoing provision of this sentence shall not apply while Employee is in the United States.

The Employee shall not seek reimbursement from the Contractor for any foreign exchange loss that he may incur in converting into Sterling United States money payable to him as compensation hereunder.

Prior to debarkation at the Point of entry, Contractors shall pay the Employee the sum of Fifty Dollars ($50.00) as an advance against his salary, and the amount of such advance shall be immediately deducted from the salary payable to or for the account of Employee thereafter or from successive salary payments in such amounts as Contractor may deem expedient or advisable.

For each continuous period of six (6) consecutive months of employment hereunder outside of the United States Contractor shall pay to Employee, in addition to the salary to which Employee is

otherwise entitled, the equivalent of one-half month's foreign salary and such additional salary shall not be in lieu of pay during such reasonable vacation leave as may be authorized by Contractor. Vacations and sick leave policies will be governed by regulations prescribed by the Contractor at the site.

Because of the emergency nature of the work and the salary to be paid to Employee, there shall be no restriction (except such as may be imposed by the medical authorities having jurisdiction) upon the number of work hours per day or the number of work days per week. The salary and compensation herein provided for Employee being substantially in excess of that which Employee has been receiving or would have received for similar services rendered in the United States at the date hereof, includes compensation for any extra and overtime services to be performed, and Employee shall not be otherwise paid or compensated for services which would ordinarily be extra or overtime services.

Failure on the part of Contractor to respond to the precise time and mode of payment of salary prescribed herein shall not be considered as a breach or default on the part of Contractor in those cases in which such failure is the result of causes beyond Contractor's control.

Article 3. Performance by Employee

Employee shall diligently and faithfully render such services and shall abide by all rules, regulations and requirements of Contractor, its officers,

agents, and supervisory employees, as well as those of the United States Government and/or the War Department, and all civil or military laws and regulations in effect from time to time at the place or places of duty hereunder during the continuance of and in connection with Employee's employment hereunder.

Article 4. Transportation

Employee consents to travel by rail, sea, and air, according to routes and by any mode of conveyance which Contractor may reasonably specify in reporting for and rendering services during employment and in traveling to and from the site.

When directed by Contractor, Employees shall return to the United States without delay by such route and means as Contractor may designate. Except as herein otherwise provided, Contractor shall furnish, cause to be furnished, or reimburse Employee for his reasonable disbursements for transportation, food, and accommodations from his present place of residence to the place of foreign duty and return to the extent that his travel is authorized or approved by Contractor.

Article 5. Passports and Preparation for Travel

This agreement is predicated upon satisfactory proof furnished by Employee that he is a citizen of the United States of America or Great Britain, and upon his ability to secure necessary passports, visas and such other permits as may be necessary to authorize his departure and absence from the

United States, to pass such physical examination, and to submit to such disease immunization and fingerprinting as may be required by proper authority or by Contractor.

If Employee is so qualified, Contractor shall obtain or cause to be obtained the necessary passports, travel permits and visas, for Employee without cost to him.

Article 6. Baggage and Property of Employee

Employee's personal baggage shall not exceed an amount to be specified by Contractor at the time of embarkation, and Contractor shall not be liable or responsible for any property of Employee or for loss or damage thereto in transit or elsewhere.

Employee shall comply with all custom and other laws and regulations of the countries from, to, or through which any of the Employee's property may be transported.

Article 7. Housing, Subsistence and Medical Services

During the time that Employee is employed hereunder and remains at the place or places of his duty outside of the United States, Contractor shall furnish or cause to be furnished, without cost to Employee, such adequate food, lodging, special clothing and equipment, medical, nursing, and hospital services and treatment and recreational facilities as circumstances may reasonably permit.

Employee shall submit prior to departure and from time to time during his employment to such

vaccination, inoculation, and/or any other medical, dental, surgical, nursing, and/or hospital treatment, preventative or curative, as the Contractor or other medical staff at the destination or elsewhere may from time to time specify, without expense to Employee.

Contractor may direct the return to the United States of Employee, if in Contractor's judgment Employee's health condition is unfavorable. [18]

Article 8. Compensation for Disability, Death, Capture, or Detention

A. (1) For the purpose of paying workmen's compensation benefits Contractor will voluntarily provide benefits as prescribed in the United States Longshoremen's and Harbor Worker's Compensation Act, approved March 4, 1927 (44 Stat. 1424), as amended, and as extended by the Act of August 16, 1941 (Public Law No. 208—77th Congress), and such benefits shall be payable to Employee or his dependents as provided in said Act. In event the injury to Employee resulting in disability or death occurs at or about the place where Employee's services are being rendered, or during transportation to or from such place, such injury shall be presumed to have arisen out of and in the course of employment whether employee then actually was so engaged; provided, that no benefits shall be payable if the injury or death was occasioned solely by the intoxication of the Employee or by the willful intention of the Employee to injure or kill himself or another.

(2) Employee who is ascertained to be missing from his place of employment, whether or not such Employee then actually was engaged in the course of his employment, under circumstances supporting an inference that his absence may be due to the belligerent action of an enemy, or who is known to have been taken by an enemy as a prisoner, hostage, or otherwise, until such time as he is returned to his home, to the place of his employment, or is able to be returned to the jurisdiction of the United States, upon approval of Contractor and within the discretion of the Contracting officer who executed the prime contract with Contractor, or his duly authorized representative, shall be regarded solely for the purpose of this provision as deceased, and the benefits as are provided for death under the United States Longshoremen's and Harbor Worker's Compensation Act, approved March 4, 1927 (14 Stat. 1424), as amended, and as extended by the Act of August 16, 1941 (Public Law No. 208—77th Congress), shall be paid to his beneficiaries, as provided under this agreement, until such time as his return has been accomplished or he is able to be returned, or death in fact is established, or can be legally presumed to have occurred, and any payment made pursuant to this provision shall not in any case be included in computing the maximum aggregate or total payable compensation for death, as provided in the said Longshoremen's and Harbor Worker's Compensation Act, approved March 4, 1927 (44 Stat. 1424), as amended, and as extended

by the Act of August 16, 1941 (Public Law No. 208—77th Congress).

(3) If Employee, or his dependents in the event of death, be awarded benefits under any workmen's compensation law of the United States or under the workmen's compensation law of any state, territory, possession or other jurisdiction for disability, death, capture or detention, Contractor shall pay the benefits so awarded by competent authority and such payments shall be in lieu of the voluntary benefits provided in subsections (1) and (2) of this section A. [19]

(4) If this agreement provides for payment of wages or salary of Employee during any period in which Employee or his beneficiaries would also be entitled to benefits under subsections (1), (2) or (3) of this section A, any benefits so payable hereunder for disability, death, capture or detention shall be a part of, and not in addition to, the wages or salary paid during such period pursuant to this agreement.

(5) Employee shall not be entitled to salary for any period during which he does not render services hereunder because of disability or captivity and detention, nor to receive disability benefits for any period during which he is entitled to receive benefits for captivity and detention.

Article 9. Taxes

Contractor shall either pay or reimburse Employee for any and all taxes lawfully levied or

assessed by any foreign Government against Employee with respect to his residence, occupation, salary, or income, provided, however, that Employee shall immediately notify Contractor in writing of any such levy or assessment and that Employee shall not pay any of such taxes as Contractor may direct him not to pay and that any claim for reimbursement shall be asserted in writing to Contractor within thirty (30) days after such payment, and provided further that Contractor shall save Employee harmless from any monetary loss resulting from or occasioned by Employee's failure to pay such taxes in compliance with instructions or directions given by Contractor.

Article 10. Tools

Contractor shall furnish or cause to be furnished tools and equipment for rendition of services hereunder by Employee, but such tools and equipment hereunder shall remain at all times the property of Contractor.

Article 11. Termination

A. Contractor may terminate Employee's and his right to receive further salary hereunder for any of the following causes:

(1) If the Contracting Officer representing the Government requires the dismissal of Employee as deemed by him to be necessary or advisable in the interests of the Government.

(2) If Contractor has reason to believe that Employee is not trustworthy, careful, or otherwise

qualified to render the services required hereunder.

(3) If Employee, in the opinion of the medical examiner or examiners designated by Contractor, is found to be afflicted with any venereal disease.

(4) If Employee violates any of the provisions of this agreement. [20]

(5) Completion by Contractor of its contract with the Government.

(6) Termination by the Government of its contract with the Contractor.

B. Under the terms of this article, Contractor shall not arbitrarily terminate Employee's employment and Contractor shall take into consideration all extenuating circumstances that may be involved except when required by the Contracting Officer to dismiss Employee as set forth in (A) (1) of this article.

C. In the event that the Employee terminates his employment hereunder voluntarily he shall not, unless otherwise approved by the Contractor, be entitled to return transportation to the United States or reimbursement therefor.

Article 12. Military Information

This agreement includes, refers to, or incorporates classified military information within the scope of the law and regulations governing the safeguarding of military information. Employee shall comply with the requirements of the pertinent regulations, particularly paragraphs 53 and 60 of Army Regulations No. 380-5, June 18, 1941, as

they may be amended or supplemented from time to time, and with any special instructions which may be issued pursuant thereto, and shall not publish, divulge, or sell anything which includes, refers to, or incorporates such classified military information without specific authority therefor from the Government. Employees shall not at any time subsequent to entering into this agreement, without the prior written consent of Contractor and the Government as represented by the War Department, publish or cause to be published in any manner or by any means, either by statements, photographs, pictures, books, articles, reports, charts, graphs, maps, or otherwise, written, pictorial, or oral, directly or indirectly relating to this agreement, the Government contract, his employment hereunder, or any other matters relating to the organization, equipping, or operation of said aircraft depot. The provisions of this paragraph may be enforced by injunctive relief and by any other applicable legal remedies.

Article 13. Disputes

Except as otherwise specifically provided in this agreement, all disputes between Contractor and Employee concerning questions of fact arising under this contract shall be decided by the Contracting Officer who executed the Government Contract or his duly authorized representative or successor (or, if there then be no Contracting Officer, by such person, if any, as may be designated by the Secretary of War for the purpose) subject to writ-

ten appeal by either party within thirty (30) days to said Secretary of War or his duly authorized representative, whose decision shall be final and conclusive upon the parties hereto. [21]

Article 14. Employee's Work Record

Before Employee returns from the foreign site, Contractor shall make in duplicate a record of his employment stating the circumstances under which Employee is returning, upon which Employee shall set forth the nature, extent and the amount of all claims of Employee against the Contractor under or arising out of this contract or his employment hereunder. Both copies of this record shall be signed by Contractor and Employee and one copy of this record shall be given to Employee who shall present same to Contractor upon his return to continental United States. No claims of any nature shall be recognized nor shall Employee by entitled to payment of any compensation, benefits or other sums whatever except upon the presentation of such record of employment and in accordance with the entries therein contained. Should such record of employment be lost or Employee be unable for any other reason to present the same upon his return, Contractor shall, as promptly as circumstances permit, obtain a duplicate of such record from the field office at the foreign site of the work and any claims which Employee may have will be adjusted promptly upon receipt of such duplicate, but not otherwise.

Article 15. Miscellaneous

This agreement shall be construed and interpreted solely in accordance with the laws of the State of California, may not be assigned by either party without the written consent of the other party, constitutes the entire agreement beween the parties hereto relating to the subject matter hereof, and shall not be binding until executed by an officer of the Contractor at its office in the City of Burbank, California.

Article 16. Headings

The headings of the various articles of this contract are for convenience and reference only and are not to be read or construed as a part of the contract.

In Witness Whereof Contractor has caused this agreement to be executed in duplicate in the City of Burbank, State of California, by its officer thereunto duly authorized and its corporate seal to be affixed hereto, and Employee has executed the same, in duplicate, the day and year first above written.

[Seal] LOCKHEED OVERSEAS CORPORATION,

By .....

President.

Witness to signature of Employee

.....

.....

Employee. [22]

Extension of Agreement of Employment

In accordance with Article I of the Eomployment Agreement heretofore entered into between Lockheed Overseas Corporation, a Delaware corporation, and the undersigned Employee, it is hereby agreed that the later date provided for in said Article I shall be May 1, 1943.

All other provisions of said Agreement shall remain in full force and effect except that part of Article II relating to the monthly rate of pay which is hereby changed to read from $..... to $.....

LOCKHEED OVERSEAS CORPORATION,

By .....

.....

Employee.

Date: ..... [23]

EXHIBIT No. 3

Secret

Agreement of Employment

Agreement made this ..... day of ....., 1943 by and between Lockheed Overseas Corporation, a Delaware corporation with its principal place of business in Burbank, California, and .....(hereinafter sometimes referred to as Employee), an individual residing at.....

Recitals

A. The United States of America (hereinafter sometimes referred to as the Government) and Lockheed Aircraft Corporation, a California corporation with its principal place of business in Burbank, California, (herein called Lockheed) have entered into a contract for the organization, equipment and operation of an aircraft depot outside the continental limits of the United States, the term of which contract has been extended by exchange of letters and may be hereafter further extended.

B. For the purpose of expediting the performance of such work, Lockheed Overseas Corporation, a wholly owned subsidiary of Lockheed, has accepted designation as major subcontractor under the above mentioned contract and has entered into a subcontract with Lockheed under which Lockheed Overseas Corporation has undertaken to organize, equip and operate said aircraft depot. Said contract and subcontract (hereinafter for convenience

referred to collectively as the Government contract) are subject to extension of the term thereof and subject to termination by the Government under the terms and conditions therein set forth. The subsidiary, Lockheed Overseas Corporation, is hereinafter referred to as Contractor.

C. Contractor desires to employ Employee for work in connection with the operation of said aircraft depot; and Employee desires to accept such employment in accordance with the terms and conditions contained herein.

D. Employee understands that he will probably be called upon to render services hereunder in a war combat zone in a foreign country or countries under relatively difficult living and working conditions, that he may be serving in the field with the armed forces of the United States or one or more of the United Nations and may be subject to military law and military discipline and that travel of Employee will be subject to the dangers of war and travel by land, sea and air. [24]

Agreement

In consideration of the premises, the mutual covenants and promises herein contained, and for other good and valuable considerations, the parties hereto agree as follows:

Article 1. Time and Duration of Employment

Contractor employs Employee to render services in connection with said aircraft depot with such duties as reasonably may be assigned to him, and

Employee accepts such employment with knowledge of the conditions recited above. The term of Employee's employment hereunder shall commence either

(a) on May 1, 1943, if Employee shall, immediately prior to May 1, 1943, have been in the employ of Contractor under any other contract; or

(b) on the date when Employee reports for duty at the time and place within the United States designated by Contractor, if Employee shall enter the employ of Contractor under this contract;

and shall continue, subject to the terms and conditions hereinafter set forth, for (i) the duration of the contract between the Government and Lockheed as from time to time extended and for such period after the termination or completion of said contract as Contractor may, in respect of such Employee, deem necessary for the winding up of the operations carried on under said contract after such termination or completion; and (ii) thereafter until return transportation to the United States for such Employee is made available by Contractor or by the Government to Contractor which transportation Contractor shall use its best efforts to obtain as promptly after the end of the period described in the foregoing clause (i) as is practicable under the circumstances then existing; and (iii) with respect to any Employee who has faithfully performed his duties and obligations here-

under throughout the term provided in the foregoing clauses (i) and (ii) or whose employment has been terminated hereunder through no fault of the Employee under Paragraph B of Article 11 hereof, for a period of sixty (60) days after such transportation is made available; provided, however, that with respect to the sixty (60) day period provided in clause three, any employee who shall during such period enter into any other employment, including the service of the Government, shall be deemed thereby to have voluntarily terminated his employment hereunder, and any employees who shall enter into such other employment shall throughout such period perform such services as may be required of him by the Contractor.

Article 2. Amount, Time and Mode of Payment of Salary

Employee's salary as long as he remains employed hereunder shall be at the rate of..... dollars per month lawful money of the United States (sometimes hereinafter referred to as foreign salary) payable monthly, in United States dollars except as hereinafter stated, provided, however, that Employee's salary [25] while employed hereunder in the United States shall be at the rate of sixty per cent (60%) of the foreign salary.

Unless otherwise approved by Contractor, the salary payable to Employee while employed hereunder outside of the United States (less any lawful deductions including any amounts paid to Employee

by Contractor at Employee's place of duty) shall be deposited for the account and at the risk of Employee in a bank in the United States to be designated by Employee or, in the absence of such designation, in a member bank of the Federal Reserve System to be selected by Contractor, and a duplicate deposit slip or receipt of such bank shall constitute conclusive evidence of payment to Employee.

Contractor shall pay to Employee at his place of duty from time to time, amounts which shall not in the aggregate exceed during any one (1) month, ten per cent (10%) of Employee's salary for such month, payable in the currency of the country in which he is located or in United States dollars, at the sole discretion of the Contractor, but the foregoing provision of this sentence shall not apply while Employee is in the United States.

The Employee will not seek reimbursement from the Contractor for any foreign exchange loss.

Prior to debarkation at the point of entry, Contractor shall pay the Employee the sum of Fifty Dollars ($50.00) as an advance against his salary, and the amount of such advance shall be immediately deducted from the salary payable to or for the account of Employee thereafter or from successive salary payments in such amounts as Contractor may deem expedient or advisable.

For each continuous period of six (6) consecutive months of employment outside of the United States under this agreement, or under this and the previ-

ous agreement, between Contractor and employee covering services in connection with the Government contract, Contractor shall pay to Employee in addition to the salary to which Employee is otherwise entitled, the equivalent of one-half month's foreign salary, and such additional salary shall not be in lieu of pay during such reasonable vacation leave as may be authorized by Contractor. Vacations and sick leave policies will be governed by regulations prescribed by the Contractor.

Because of the emergency nature of the work and the salary to be paid to Employee, there shall be no restriction (except such as may be imposed by the medical authorities having jurisdiction) upon the number of work hours per day or the number of work days per week. The salary and compensation herein provided for Employee being substantially in excess of that which Employee has been receiving or would have received for similar services rendered in the United States at the date hereof, includes compensation for any extra and overtime services to be performed, and Employee shall not be otherwise paid or compensated for services which would ordinarily be extra or overtime services.

Failure on the part of the Contractor to respond to the precise time and mode of payment of salary prescribed herein shall [26] not be considered as a breach or default on the part of the Contractor in those cases in which such failure is the result of causes beyond Contractor's control.

Article 3. Performance by Employee

Employee shall throughout entire term of his employment hereunder, as hereinbefore provided, diligently and faithfully perform the services and duties required of him hereunder, and shall abide by all rules, regulations and requirements of Contractor, its officers, agents, and supervisory employees, as well as those of the United States Government and/or War Department, and all civil or military laws and regulations in effect from time to time at the place or places of duty hereunder.

Article 4. Transportation

Employee consents to travel by land, sea and air, according to routes and by any mode of conveyance which Contractor may reasonably specify in reporting for and rendering services during employment and in traveling to and from the site.

When directed by Contractor, Employee shall return to the United States without delay by such route and means as Contractor may designate. Except as herein otherwise provided, Contractor shall furnish, cause to be furnished, or reimburse Employee for his reasonable disbursements for transportation, food, and accommodations from his present place of residence to the place of foreign duty and return to the extent that his travel is authorized or approved by Contractor.

Article 5. Passports and Preparation for Travel

This agreement is predicated upon satisfactory

proof furnished by Employee that he is a citizen of the United States of America or Great Britain, and upon his ability to secure necessary passports, visas and such other permits as may be necessary to authorize his departure and absence from the United States, to pass such physical examination, and to submit to such disease immunization and fingerprinting as may be required by proper authority or by Contractor.

If Employee is so qualified, Contractor shall obtain or cause to be obtained the necessary passports, travel permits and visas, for Employee without cost to him.

Article 6. Baggage and Property of Employee

Employee's personal baggage shall not exceed an amount to be specified by Contractor at the time of embarkation, and Contractor shall not be liable or responsible for any property of Employee or for loss or damage thereto in transit or elsewhere.

Employee shall comply with all custom and other laws and regulations of the countries from, to, or through which any of the Employee's property may be transported. [27]

Article 7. Housing, Subsistence and Medical Services

During the time that Employee is employed hereunder at any place or places outside of the United States, Contractor shall furnish or cause to be furnished without cost to Employee, such adequate

food, lodging, special clothing and equipment, medical, nursing, and hospital services and treatment and recreational facilities as circumstances may reasonably permit.

Prior to departure from the United States, Employee shall submit to such physical examination, vaccination and inoculation as the Contractor shall direct at no expense to Employee. Thereafter Employee shall from time to time during the term of his employment submit to such further examination, vaccination, inoculation and other medical, dental, surgical, nursing and/or hospital treatment, preventative or curative as Contractor's or such other medical staff as may be specified by Contractor may from time to time require or deem necessary or desirable.

Article 8. Compensation for Disability, Death, Capture or Detention

A. (1) For the purpose of paying workmen's compensation benefits Contractor will provide benefits as prescribed in the United States Longshoremen's and Harbor Worker's Compensation Act, approved March 4, 1927 (44 Stat. 1424), as amended, and as extended by the Act of August 16, 1941 (Public Law No. 208—77th Congress), and such benefits shall be payable to Employee or his dependents as provided in said Act. In event the injury to Employee resulting in disability or death occurs at or about the place where Employee's services are being rendered, or during transportation to or from such place, such injury shall be

presumed to have arisen out of and in the course of employment whether employee then actually was so engaged; provided, that no benefits shall be payable if the injury or death was occasioned solely by the intoxication of the Employee or by the willful intention of the Employee to injure or kill himself or another.

(2) Employee who is ascertained to be missing from his place of employment, whether or not such Employee then actually was engaged in the course of his employment, under circumstances supporting an inference that his absence may be due to the belligerent action of an enemy, or who is known to have been taken by an enemy as a prisoner, hostage, or otherwise, until such time as he is returned to his home, to the place of his employment, or is able to be returned to the jurisdiction of the United States, upon approval of Contractor and within the discretion of the Contracting Officer who executed the Government contract, or his duly authorized representative, shall be regarded solely for the purposes of this provision as deceased, and the benefits as are provided for death under the United States Longshoremen's and Harbor Worker's Compensation Act, approved March 4, 1927 (14 Stat. 1424), as amended, and as extended by the Act of August 16, 1941 (Public Law No. 208—77th Congress), shall be [28] paid to his beneficiaries, as provided under this agreement, until such time as his return has been accomplished or he is able to be returned, or death in fact is established, or can be legally presumed to have occurred, and any pay-

ment made pursuant to this provision shall not in any case be included in computing the maximum aggregate or total payable compensation for death, as provided in the said Longshoremen's and Harbor Worker's Compensation Act, approved March 4, 1927 (44 Stat. 1424), as amended, and as extended by the Act of August 16, 1941 (Public Law No. 208—77th Congress).

(3) If Employee, or his dependents in the event of death, be awarded benefits under any workmen's compensation law of the United States or under the workmen's compensation law of any state, territory, possession or other jurisdiction for disability, death, capture or detention, Contractor shall pay the benefits so awarded by competent authority and such payments shall be in lieu of the benefits provided in subsections (1) and (2) of this Section A.

(4) If this agreement provides for payment of wages or salary of Employee during any period in which Employee or his beneficiaries would also be entitled to benefits under subsections (1), (2) or (3) or this Section A, any benefits so payable hereunder for disability, death, capture or detention shall be a part of, and not in addition to, the wages or salary paid during such period pursuant to this agreement.

(5) Employee shall not be entitled to salary for any period during which he does not render services hereunder because of captivity and detention, nor to receive disability benefits for any period during which he is entitled to receive benefits for captivity and detention.

Article 9. Taxes

Contractor shall either pay or reimburse Employee for any and all taxes lawfully levied or assessed by any foreign Government against Employee with respect to his residence, occupation, salary, or income, provided, however, that Employee shall immediately notify Contractor in writing of any such levy or assessment and that Employee shall not pay any of such taxes as Contractor may direct him not to pay and that any claim for reimbursement shall be asserted in writing to Contractor within thirty (30) days after such payment, and provided further that Contractor shall save Employee harmless from any monetary loss resulting from or occasioned by Employee's failure to pay such taxes in compliance with instructions or directions given by Contractor.

Article 10. Tools

Contractor shall furnish or cause to be furnished tools and equipment for rendition of services hereunder by Employee, but such tools and equipment hereunder shall remain at all times the property of the Contractor. [29]

Article 11. Termination

A. Contractor may terminate Employee's employment and his right to receive further salary hereunder for any of the following causes:

(1) If the Contracting Officer representing the Government requires the dismissal of Em-

ployee as deemed by him to be necessary or advisable in the interests of the Government.

(2) If Contractor has reason to believe that Employee is not trustworthy, careful, or is otherwise disqualified to render the services required hereunder.

(3) If Employee, in the opinion of the medical examiner or examiners designated by Contractor, is found to be afflicted with any venereal disease.

(4) If Employee violates any of the provisions of this agreement or fails faithfully and diligently to perform the services and duties required of him hereunder.

Upon termination by the Contractor under this Paragraph A, the Contractor may in its discretion, but shall not be required to, make available to Employee return transportation to the United States but shall have no obligation to pay Employee any salary for any period from and after such termination.

B. Contractor may further terminate Employee's employment without cause under the following circumstances:

(1) Upon or after the completion of the Government contract.

(2) Upon or after termination by the Government of the Government contract.

(3) If, in the opinion of the Contractor, the health or physical condition of Employee is such as to render further services by Employee hereunder undesirable.

In the event of termination by the Contractor under this Paragraph B of Article 11, Contractor shall make available to Employee return transportation to the United States and Employee shall be entitled to receive salary as provided in Article 2 hereof until such return transportation is made available and for the period of sixty (60) days thereafter, as provided in said Article 1.

C. In the event that Employee terminates his employment hereunder voluntarily, he shall not from and after such termination be entitled to any salary hereunder or, unless otherwise approved by Contractor, to return transportation to the United States or reimbursement therefor. [30]

D. Contractor shall not arbitrarily terminate Employee's employment under Paragraph A of this Article and shall take into consideration in connection with any such termination all extenuating circumstances which may be involved, except when required by the Contracting Officer to terminate Employee's employment pursuant to sub-paragraph (1) of Paragraph A.

Article 12. Military Information

This agreement includes, refers to, or incorporates classified military information within the scope of the laws and regulations governing the safeguarding of military information. Employee shall comply with the requirements of the pertinent regulations, particularly Paragraphs 53 and 60 of Army Regulations No. 380-5, June 18, 1941, as they

may be amended or supplemented from time to time, and with any special instructions which may be issued pursuant thereto, and shall not publish, divulge, or sell anything which includes, refers to, or incorporates such classified military information without specific authority therefor from the Government. Employee shall not at any time subsequent to entering into this agreement, without the prior written consent of Contractor and the Government as represented by the War Department, publish or cause to be published in any manner or by any means, either by statements, photographs, pictures, books, articles, reports, charts, graphs, maps, or otherwise, written, pictorial, or oral, directly or indirectly relating to this agreement, the Government contract, his employment hereunder, or any other matters relating to the organization, equipping, or operation of said aircraft depot. The provisions of this paragraph may be enforced by injunctive relief and by any other applicable legal remedies.

Article 13. Employee's Work Record

Before Employee returns from the foreign site, Contractor shall make in duplicate a record of his employment stating the circumstances under which Employee is returning, upon which Employee shall set forth the nature, extent and the amount of all claims of Employee against the Contractor under or arising out of this contract or his employment hereunder. Both copies of this record shall be signed by Contractor and Employee and one copy

of this record shall be given to Employee who shall present same to Contractor upon his return to continental United States. No claims of any nature shall be recognized nor shall Employee be entitled to payment of any compensation, benefits or other sums whatever except upon the presentation of such record of employment and in accordance with the entries therein contained. Should such record of employment be lost or Employee be unable for any other reason to present the same upon his return, Contractor shall, as promptly as circumstances permit, obtain a duplicate of such record from the field office at the foreign site of the work and any claims which Employee may have will be adjusted promptly upon receipt of such duplicate, but not otherwise. [31]

Article 14. Miscellaneous

This agreement shall be construed and interpreted solely in accordance with the laws of the State of California, may not be assigned by either party without the written consent of the other party, constitutes the entire agreement between the parties hereto relating to the subject matter hereof, and shall not be binding until executed by an officer of the Contractor at its office in the City of Burbank, State of California.

Article 15. Headings

The headings of the various articles of this contract are for convenience and reference only and are not to be read or construed as a part of the contract.

In Witness Whereof Contractor has caused this agreement to be executed in duplicate in the City of Burbank, State of California, by its officer thereunto duly authorized and its corporate seal to be affixed hereto, and Employee has executed the same, in duplicate, the day and year first above written.

[Seal] LOCKHEED OVERSEAS CORPORATION,

By .....
President.

Witness to signature of Employee:

.....
Interviewer Signature.

.....
Employee. [32]

[Title of Tax Court and Cause.]

FINDINGS OF FACT AND OPINION

Docket No. 9117. Promulgated November 12, 1946

Petitioner, a citizen of the United States, went to the British Isles in 1942 as an employee of Lockheed Overseas Corporation to do work essential to the war effort. Petitioner went aboard a British vessel then anchored in New York harbor on June 30, 1942. The vessel did not sail until the morning of July 1, 1942. Petitioner landed in the British Isles in July, 1942, and remained there until July, 1944, when he returned to the United States. After disembarking at Liverpool in July, 1942, pe-

titioner went to a small base in Glazebrook, England, where he spent a few weeks and after that he was stationed at the main American air base in Northern Ireland. Held, that petitioner was not a bona fide nonresident of the United States for more than six months in the year 1942 within the meaning of section 116 I.R.C. and the compensation which he received for his overseas service in 1942 is not exempt from taxation. Held, further, that petitioner was not during 1943 a "bona fide resident of a foreign country or countries" within the meaning of section 116 I.R.C. as amended by section 148(a) of the Revenue Act of 1942 and the salary which he received from Lockheed in 1943 is not exempt from taxation. Michael Downs, et ux, 7 T.C. ...., promulgated October 24, 1946, followed.

ROBERT A. WARING, ESQ.,
For the Petitioner.

A. J. HURLEY, ESQ.,
For the Respondent. [33]

The Commissioner has determined a deficiency in petitioner's income tax of $1,311.01 for the year 1943. The Commissioner in explanation of the deficiency which he has determined stated in the deficiency notice as follows:

> It is held that compensation in the amount of $1,418.59 received by you during the year 1942 for personal services rendered in the United States for Vega Aircraft Corporation and Lockheed Overseas Corporation, and com-

pensation in the amounts of $2,600.00 and $5,262.50 received by you in 1942, and 1943, respectively, for services rendered while temporarily employed in Northern Ireland by Lockheed Overseas Corporation, represent taxable income under the provisions of Section 22 of the Internal Revenue Code, as amended.

It is held further that all earnings during your temporary employment in Northern Ireland may not be excluded from gross income under section 116 of the Internal Revenue Code, as amended.

In contesting the foregoing determination, the petitioner assigns errors as follows:

(a) In determining the taxable net income of petitioner for the year 1942, the Commissioner and Revenue Agent in Charge erroneously included the sum of $2600.00 earned by taxpayer while a bona fide resident overseas.

(b) In determining the net income for the year 1943, the Commissioner and Revenue Agent In Charge erroneously included the sum of $5,262.50 earned outside of the United States by taxpayer while a bona fide resident of North Ireland.

FINDINGS OF FACT

Petitioner is a single man, a citizen of the United States residing in Los Angeles, California. Petitioner timely filed income tax returns for the taxable years 1942 and 1943 with the Collector of In-

ternal Revenue for the District of Maryland. [34]

Early in 1942 Lockheed Aircraft Corporation entered into a contract with the United States Government in which the corporation agreed to organize, equip and operate an aircraft depot in Northern Ireland in connection with the war effort. The project was designated by the United States Army as operation "Magnet". In connection with the operation it was necessary for the Lockheed Aircraft Corporation and its subcontractor, Lockheed Overseas Corporation, sometimes hereafter referred to as Lockheed, to employ large numbers of skilled men in the United States and transport them to the British Isles. It was estimated that some 5,400 American citizens at one time or another were employed by Lockheed at the aircraft depot in Northern Ireland.

From January 1 to June 30, 1942, petitioner was employed as a secretary by Vega Aircraft Corporation and by Lockheed at Burbank, California. During that time he received a salary amounting to $1,418.59.

On or about February 18, 1942, petitioner made out and signed a formal application for overseas employment with Lockheed and in connection with such application signed a contract shortly thereafter with the corporation in which he agreed to perform services for the company at an aircraft depot to be operated by it in the British Isles. The application which petitioner signed for employment with Lockheed was headed: "Application For

Foreign Service." The application contained the following question:

> Are you willing to go to any part of the world? Yes.
>
> For how long? 1 year. 2 years. Longer X.

Petitioner in his application for foreign service thus indicated a willingness to serve as an employee of Lockheed overseas for more than two years, if necessary. The contract provided, inter alia, as follows:

> Article 1. Time and Duration of Employment
>
> Contractor employs Employee to render services in connection with said aircraft depot with such duties as reasonably may be assigned to him, and Employee accepts such employment with knowledge of the conditions recited above. Subject to the terms and conditions hereinafter set forth, Employee's employment hereunder shall commence when he reports for duty at a point within the United States to be designated by Contractor, at the time and place designated by Contractor, and shall continue until November 1, 1942, or such later date as may be agreed upon and thereafter until sixty (60) days after return transportation to the United States is made available by Contractor, it being understood that such return transportation shall be made available on November 1, 1942, or the later date agreed upon or as soon thereafter as is practicable under the circumstances then existing.

Article 7. Housing, Subsistence and Medical Services

During the time that Employee is employed hereunder and remains at the place or places of his duty outside of the United States, Contractor shall furnish or cause to be furnished, without cost to Employee, such adequate food, lodging, special clothing and equipment, medical, nursing, and hospital services and treatment and recreational facilities as circumstances may reasonably permit.

Employee shall submit prior to departure and from time to time during his employment to such vaccination, inoculation, and/or any other medical, dental, surgical, nursing, and/or hospital treatment, preventative or curative, as the Contractor or other medical staff at the destination or elsewhere may from time to time specify, without expense to Employee.

Contractor may direct the return to the United States of Employee, if in Contractor's judgment Employee's health condition is unfavorable. [36]

* * * * * * *

Article 9. Taxes

Contractor shall either pay or reimburse Employee for any and all taxes lawfully levied or assessed by any foreign Government against Employee with respect to his residence, occupation, salary, or income, provided, however, that Employee shall immediately notify Contractor in writing of any such levy or assess-

> ment and that Employee shall not pay any of such taxes as Contractor may direct him not to pay and that any claim for reimbursement shall be asserted in writing to Contractor within thirty (30) days after such payment, and provided further that Contractor shall save Employee harmless from any monetary loss resulting from or occasioned by Employee's failure to pay such taxes in compliance with instructions or directions given by Contractor.

Pursuant to the terms of his contract, petitioner on June 30, 1942, boarded the H.M.S. Maloja, a vessel of British registry and under a British captain and officers, berthed in New York harbor. Because of the danger of German submarines, Hoofnell was not allowed any contacts with the mainland after he boarded the vessel. The Maloja, with petitioner aboard, sailed from New York harbor early on the morning of July 1, 1942, bound for the British Isles. Petitioner landed in Liverpool, England.

Petitioner was admitted to the British Isles on a visa as an employee of Lockheed. This visa, under British law, had to be put in use within three months from the date it was issued but the time that the holder would be allowed to stay is not mentioned therein. The visa, under British law, would permit him to remain for the purpose for which it was given, as an employee of Lockheed, and if and when Lockheed terminated its work over there, petitioner would be expected to depart with-

in a reasonable time when transport was available and subject to any extensions that might be given him by the home office in London or local authorities in Belfast. [37]

After disembarking, petitioner was first assigned to a small base near Glazebrook, England, for several weeks, after which he was transferred to the main base in Ireland.

The expiration date of petitioner's contract was extended by agreement of the parties until May 1, 1943, at which time he entered into a new contract with Lockheed Overseas Corporation. This new contract provided, inter alia, as follows:

> Article 1. Time and Duration of Employment
>
> Contractor employs Employee to render services in connection with said aircraft depot with such duties as reasonably may be assigned to him, and Employee accepts such employment with knowledge of the conditions recited above. The term of Employee's employment hereunder shall * * *
>
> * * * *
>
> * * * continue, subject to the terms and conditions hereinafter set forth, for (i) the duration of the contract between the Government and Lockheed as from time to time extended and for such period after the termination or completion of said contract as Contractor may, in respect of such Employee, deem necessary for the winding up of the operations carried on under said contract after such termination or

completion; and (ii) thereafter until return transportation to the United States for such Employee is made available by Contractor or by the Government to Contractor which transportation Contractor shall use its best efforts to obtain as promptly after the end of the period described in the foregoing clause (i) as is practicable under the circumstances then existing; * * *

The Petitioner remained in the employ of Lockheed stationed in Northern Ireland until July 13, 1944, when he returned to the United States. [38]

Petitioner received as compensation for personal services rendered to Lockheed in the British Isles and Northern Ireland during the year 1942 the sum of $2,600 and during 1943 the sum of $5,262.50, of which sums 90 per cent was deposited by the corporation to the account of the petitioner with the Bowling Green Trust Co., Bowling Green, Kentucky, pursuant to Article 2 of his employment contract.

Petitioner did not at any time make any application to become a citizen of Northern Ireland, or a British subject. During the taxable year 1943 he was domiciled in the United States and his intentions were to remain in Ireland not longer than the duration of the war or until his employment with Lockheed Overseas Corporation terminated, at which time he intended to return to the United States. He did not pay any income taxes to the Government of Northern Ireland or to the United

Kingdom of Great Britain. Taxpayer stated on both his returns for 1942 and 1943 as follows:

> Taxpayer claims exemption from Federal Income Tax for the period June 30, 1942, to July 12, 1944, for the reason that during that period he was a resident of the British Isles and North Ireland within the meaning of the Revenue Code and of Sec. 116 thereof and as the term resident is defined in Regulations 111 Sec. 29. 211-2.
>
> Taxpayer embarked on June 30, 1942, on H.M.S. Maloja bound for British Isles and Ireland, where he remained a resident until his return to New York City on July 12, 1944.
>
> When he applied to Lockheed for the above employment he intended to and promised them he would remain in their overseas service as long as their contract with the U. S. Army required for the duration of the war and as long thereafter as needed: He had no definite intentions as to his stay overseas other than as above stated; he did not know or plan when he might be able to return because of the uncertainty of the duration of the war.

Any of the stipulated facts not embodied in the foregoing facts are incorporated herein by reference.

OPINION

Black, Judge: This proceeding involves a deficiency in income tax for the year 1943 in the amount of $1,311.01. The deficiency includes an

unforgiven tax liability for the taxable year 1942 in the amount of $172.60. That is why the year 1942 is involved.

Petitioner was paid $2,600 for his services overseas with Lockheed in 1942. If petitioner was absent from the United States more than six months in 1942, then the $2,600 is not taxable to him. Both parties agree on this. The applicable statute is section 116, I.R.C., as it existed before the 1942 Act amendment and is printed in the margin.[1] The statute in question has been interpreted to mean that the taxpayer must be actually physically absent from the United States for more than six months in the taxable year before he is entitled to the granted exemption. See Commissioner v. Fiske's

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[1]Sec. 116. Exclusions From Gross Income.

In addition to the items specified in section 22 (b), the following items shall not be included in gross income and shall be exempt from taxation under this chapter:

> (a) Earned Income From Sources Without United States.—In the case of an individual citizen of the United States, a bona fide nonresident of the United States for more than six months during the taxable year, amounts received from sources without the United States except amount paid by the United States or any agency thereof) if such amounts would constitute earned income as defined in section 25(a) if received from sources within the United States; but such individual shall not be allowed as a deduction from his gross income any deductions properly allocable to or chargeable against amounts excluded from gross income under this subsection.

Estate, 128 Fed. (2d) 487; Commissioner v. Swent et ux., 155 Fed. 2d) 513.

The decision of the question whether petitioner was absent from the United States for more than six months in 1942 depends upon the answer to a simple question of law, namely: Is an American citizen "outside the United States" when he is aboard a vessel belonging to a foreign Government tied to a pier in New York harbor? Petitioner boarded a British steamer in New York harbor on June 30, 1942, bound for the British Isles. After he boarded the British vessel he was kept there and was not allowed to communicate with anyone on the outside. This was on account of guarding against submarine danger. The vessel, however, did not sail until the morning of July 1, 1942. Petitioner seems to argue that was "outside the United States" the moment he boarded the British vessel. If that were true, then of course petitioner was absent from the United States all of July, August, September, October, November and December and part of a day in June. That would mean that he was absent from the United States for more than six months in 1942 and would be entitled to have the $2,600 excluded from his income in 1942.

Respondent argues, however, that although petitioner boarded the British vessel in New York harbor on June 30, 1942, he did not sail until the morning of July 1st and that as long as he was in New York harbor he was still in the United States, even though aboard a British vessel. We see no escape from this conclusion. [41]

Whatever may be the International Maritime law with respect to jurisdiction over crimes committed aboard foreign vessels, we do not think such law would have any application to such a question as we have here. While it may be true that for certain purposes British sovereignty extended over the vessel H.M.S. Maloja while she was anchored in New York harbor, nevertheless for purposes of section 116(a), supra, petitioner was not "outside the United States" as long as the ship remained at its pier in New York harbor. Petitioner cites no case which would support his position on this issue and we do not know of any. We, therefore, hold on the facts that petitioner was not a bona fide nonresident of the United States for more than six months during the taxable year 1942 and the $2,600 in question should not be excluded from his income in 1942.

As to the $5,262.50 which petitioner received from Lockheed for overseas service in 1943, section 116 I.R.C. as amended by section 148(a) of the Revenue Act of 1942 governs. That section is printed in the margin.[2] This same section of the statute and the

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[2]Sec. 116. Exclusions From Gross Income.

In addition to the items specified in section 22 (b), the following items shall not be included in gross income and shall be exempt from taxation under this chapter:

(a) Earned Income From Sources Without the United States:

(1) Foreign resident for entire taxable year.—In the case of an individual citizen of the United States, who establishes to the satisfaction of the Commissioner that he is a bona

applicable Treasury Regulations were fully discussed by us in the recent cases of Arthur J. H. Johnson, 7 T.C. .... and Michael Downs, et ux, 7 T.C. ...., both promulgated October 24, 1946. The case of Michael Downs was very similar in its facts to those present in the instant case. It did not involve the year 1942 but it did involve the year 1943 under facts which we think are not distinguishable from those which are present here. Therefore, following Michael Downs, supra, we decide the issue as to 1943 in favor of the respondent.

Reviewed by the Court.

Decision will be entered for the respondent.

Van Fossan and Leech, JJ., dissent on the second point.

[Seal] [43]

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fide resident of a foreign country or countries during the entire taxable year, amounts received from sources without the United States (except amounts paid by the United States or any agency thereof) if such amounts would constitute earned income as defined in section 25(a) if received from sources within the United States; but such individuals shall not be allowed as a deduction from his gross income any deduction properly allocable to or chargeable against amounted excluded from gross income under this subsection.

The Tax Court of the United States
Washington

Docket No. 9117

J. GERBER HOOFNEL,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DECISION

Pursuant to the determination of the Court, as set forth in its Findings of Fact and Opinion, promulgated November 12, 1946, it is

Ordered and Decided: That there is a deficiency in income tax of $1,311.01 for the year 1943.

/s/ EUGENE BLACK,
Judge.

Entered Nov. 13, 1946. [44]

[Title of Tax Court and Cause.]

STIPULATION AS TO VENUE

Pursuant to Section 1141 (b) (2) of the Internal Revenue Code and under the authority of Industrial Ass'n. v. Commissioner, 323 U. S. 310, the parties hereto, through their respective counsel, hereby stipulate and agree to, and do, designate the United

States Circuit Court of Appeals for the Ninth Circuit as the court to review the above-entitled cause.

Dated this 19th day of March, 1947.

/s/ ROBERT A. WARING,
Counsel for Petitioner.

/s/ SEWALL KEY,
Counsel for Respondent.

Filed March 21, 1947. [45]

United States Circuit Court of Appeals
For the Ninth Circuit

Docket No. 9117

J. GERBER HOOFNEL,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR REVIEW OF DECISION OF THE TAX COURT OF THE UNITED STATES

To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Comes now J. Gerber Hoofnel, petitioner herein and respectfully shows:

I.

NATURE OF THE CONTROVERSY

The Respondent determined a deficiency in the income tax against the Petitioner for the calendar year 1943 in the amount of $1311.01.

This deficiency arose from the denial of taxpayer's claim to exemption from individual income tax of his salary from Lockheed Overseas Corporation of $2600.00 for the last half of the calendar year 1942 and of $5,262.50 for the calendar year 1943, while a bona fide resident of the British Isles and North Ireland [46] within the meaning of Sec. 116 (a) (1) as amended by Sec. 148 (a) of the Revenue Act of 1942 and under Sec. 29.211-2 of Treasury Regulations 111.

Petitioner filed an appeal to the Tax Court of the United States.

Thereafter on November 13, 1946, The Tax Court of the United States rendered its decision in favor of the respondent. Said decision describes in detail the controversy involved, which briefly is as follows:

Early in 1942, Lockheed Aircraft Corporation (L. A. C.) entered into a contract with the United States Government to organize, equip and operate an aircraft depot at Belfast in Northern Ireland to employ a large number of skilled mechanics (utilmately some 5,400 American citizens in all). These were picked mechanics from varied industries throughout the United States but mostly from aircraft industries in California. Actually the opera-

tion was under a subsidiary, Lockheed Overseas Corporation (L. O. C.) and was under direction of the U. S. Army as operation "Magnet".

J. Gerber Hoofnel, a single man, was employed at Burbank, California, by Vega Aircraft Corporation, a subsidiary of Lockheed Aircraft Corporation, from Jan. 1, 1942, until about Feb. 18, 1942, when he made application and signed a contract for overseas employment with L. O. C. and shifted to same. In his written application he stated that he was willing to stay for over two years. The contract provided that L. O. C. would reimburse him for any and all taxes lawfully levied or assessed by any foreign government against [47] him while an employee of the corporation in the British Isles and North Ireland.

Pursuant to the terms of his contract, petitioner on June 30, 1942, boarded the H.M.S. Maloja, a vessel of British registry and under a British captain and officers, berthed in New York harbor. Because of the danger of German submarines, Hoofnell was not allowed any contacts with the mainland after he boarded the vessel. The Maloja, with petitioner aboard, sailed from New York harbor early on the morning of July 1, 1942, bound for the British Isles. Petitioner landed in Liverpool, England.

After disembarking, petitioner was first assigned to a small base near Glazebrook, England, for several weeks, after which he was transferred to the main base in Ireland.

As of May 1, 1943, he entered into a written contract with Lockheed in which he agreed to render

such services in connection with said aircraft depot as might reasonably be assigned to him for the duration of the contract between the Government and Lockheed as from time to time extended (which meant for the duration of the war and beyond).

At no time during his stay overseas did the British demand any income tax of him nor did our Treasury Department require any income tax to be withheld from his salary by L. O. C. although ninety per cent of said salary was deposited by L. O. C. to the credit of taxpayer in his bank in the United States per Article 2 of his employment contract.

Within ninety days of his return, July 12, 1944, to [48] New York City, taxpayer made an income tax return of his total salary, domestic and foreign, earned for the calendar years 1942, 1943 and 1944, to the Collector at Baltimore, Maryland, in which he claimed to be exempt from individual income tax for the period he was overseas on the ground that he was then a bona fide resident of the British Isles as first herein noted. These returns were later transferred to the Los Angeles office of the Collector and the deficiency tax herein at issue was assessed by that office.

In its opinion in the Hoofnel case, the Court refers to and predicates its decision upon its decision in that of Michael Downs, et ux., 7 T.C. No. 123, which by stipulation was tried at the same time with and upon substantially identical facts so far as concerns the taxable year 1943. And in turn the Downs decision depends upon references repeatedly made by the Court to its opinion in the

case of Arthur J. H. Johnson, 7 T.
of these cases were promulgated on
the Tax Court.

In its opinion, the Tax Court
taxpayer and the Government ag
much as Sec. 116 I.R.C. does not de
of "bona fide resident of a foreign
tries", that Treasury Regulations
and 29.211-2 must be looked to to
interpretation of the words thus us

The pertinent part of the latter
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disregarding the plain language of the above R
lations, found that Congress had in express langu
vested in the Commissioner discretionary po
to determine this question of residence and that
attitude of the Commissioner is correctly state
I. T. 3642 Cum. Bull. 1944, page 262. This
concerns a citizen of the United States who
to Canada Jan. 1, 1943, on a war project for
year 1943 and who intended to remain there
May, 1944.

Following its decision in Arthur J. H. John
7 T.C., decided the same day as the Downs
Hoofnel cases, the United States Tax Court
that taxpayer was not a bona fide resident of
British Isles for the calendar year 1943 and
his overseas income for that year was there
taxable. So closely are the Downs and Hoo
decisions tied into that of Johnson that one can
well read the Downs and Hoofnel decisions
out a copy of the Johnson decision and yet the J
son case is not in [50] point because he wen
Greenland for a limited period; where, und
"condition unique in history" (in the languag
the Tax Court) the United States, in a treaty
Denmark, had complete jurisdiction in the base

regard the plain language of Regulations 111 Sec. 29.211-2, as above quoted, and assess the tax here involved;

(b) in finding as a fact or deciding as a matter of law that I.R.C. Sec. 116 (a) (1) vested in the Commissioner discretionary power to determine that taxpayer was not a resident of the British Isles for the taxable year 1943, even though he acted bona fide and met the conditions of Regulations 111 Sec. 29.211-2.

(c) in finding as a fact or deciding as a matter of law that taxpayer was not a bona fide non-resident of the United States for more than six months during the taxable year 1942, and that the $2600 earned by him during that period should not be excluded from his 1942 income. [51]

II.

The Court in Which Review Is Sought

The United States Circuit Court of Appeals for the Ninth Circuit is the Court in which review of said decision of The Tax Court of the United States is sought pursuant to the provisions of Section 1141 of the Internal Revenue Code.

III.

Venue

For more than two years last past preceding, petitioner has resided in the County of Los Angeles, State of California. The deficiency notice involved in this appeal was issued by the Collector of Internal Revenue at Los Angeles in the Sixth District

of California, whose office is located within the Ninth Judicial Circuit of the United States. The hearing before the United States Tax Court was held in Los Angeles, California.

The parties hereto have not stipulated that said decision may be reviewed by any Court of Appeals other than the one herein designated.

Wherefore, the Petitioner prays that the decision of The Tax Court of the United States herein be reviewed by the United States Circuit Court of Appeals for the Ninth Circuit; that a transcript of the record be prepared in accordance with the law and rules of said Court and transmitted to the Clerk of [52] said Court for filing; and that appropriate action be taken to the end that the errors complained of may be reviewed and corrected by said Court.

Dated: February 7, 1947.

ROBERT A. WARING,
Attorney for Petitioner.

Received and filed T.C.U.S. Feb. 10, 1947. [53]

[Title of Circuit Court of Appeals and Cause.]

NOTICE OF FILING PETITION FOR REVIEW

To J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue:

You are hereby notified that J. Gerber Hoofnel did, on the 10th day of February, 1947, file with

the Clerk of The Tax Court of the United States, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Ninth Circuit, of the decisions of this Court heretofore rendered in the above-entitled case. Copy of the petition for review as filed is hereto attached and served upon you.

Dated this 12th day of February, 1947.

/s/ VICTOR S. MERSCH,
Clerk, The Tax Court
of the United States.

Service of copy of petition for review acknowledged February 12, 1947.

/s/ J. P. WENCHEL, CAR
Chief Counsel,
Bureau of Internal Revenue,
Attorney for Respondent.

Filed T.C.U.S. Feb. 12, 1947. [54]

[Title of Circuit Court of Appeals and Cause.]

NOTICE OF FILING PETITION FOR REVUE

To John P. Wenchel, Chief Counsel, Bureau of Internal Revenue, Washington, D. C., Attorney for the Respondent:

Please Take Notice that on the 10th day of February, 1947, the undersigned filed with the Clerk of The Tax Court of the United States the petition

of J. Gerber Hoofnel, a copy of which is annexed hereto, for the review by the United States Circuit Court of Appeals for the Ninth Circuit of the final order and decision of the Court heretofore rendered in the above entitled case.

Dated this 10th day of February, 1947.

ROBERT A. WARING,
Attorney for the Petitioner.

ADMISSION OF SERVICE

Service of a copy of the above notice and a copy of the petition for review is hereby accepted this 11th day of February, 1947.

/s/ J. P. WENCHEL, CAR
Chief Counsel,
Bureau of Internal Revenue,
Attorney for Respondent.

Filed T.C.U.S. Feb. 12, 1947. [55]

[Title of Circuit Court of Appeals and Cause.]

PETITIONER'S STATEMENT OF POINTS TO BE RELIED ON AND DESIGNATION OF PARTS OF THE RECORD TO BE PRINTED.

Comes now J. Gerber Hoofnel, the petitioner for review in the above-entitled cause, and states that the points on which he intends to rely in this cause are as follows:

1. The Tax Court of the United States erred in finding as a fact or deciding as a matter of law that

the Commissioner of Internal Revenue had discretionary power to disregard the plain language of Regulations 111 Sec. 29.211-2, and assess the tax here involved.

2. The said Tax Court erred in failing to find as a matter of fact and deciding as a matter of law that petitioner under said Sec. 29.211-2 of said Regulations was a bona fide resident of the British Isles and North Ireland for the calendar year 1943, and exempt from income tax on his overseas salary of $5262.50 for that year. [56]

3. The said Tax Court erred in finding as a fact or deciding as a matter of law that I. R. C. Sec. 116(a)(1) vested in the Commissioner discretionary power to determine that taxpayer was not a resident of the British Isles for the taxable year 1943, even though he acted bona fide and met the conditions of Regulations 111 Sec. 29.211-2; and said Court erred in failing to find that under said section of I. R. C. and under said section of said Regulations, the petitioner was exempt from income tax on his said overseas salary.

4. The said Tax Court erred in finding as a fact or deciding as a matter of law that taxpayer was not a bona fide non-resident of the United States for more than six months during the taxable year 1942, and that the $2600 earned by him during that period should not be excluded from his 1942 income.

Petitioner hearby designates the entire record, as certified to the Clerk of the above-entitled Court,

as necessary to be printed for the consideration of the points set forth above.

/s/ ROBERT A. WARING,
Attorney for Petitioner.

Service admitted March 21, 1947.

/s/ J. P. WENCHEL, CAR

Received and filed T.C.U.S. March 26, 1947. [57]

The Tax Court of the United States

Docket No. 9117

J. GERBER HOOFNEL,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

STATEMENT OF EVIDENCE

The following is a statement of evidence in narrative form in the above entitled cause.

This cause came on for hearing before Honorable Eugene Black, Judge of The Tax Court of the United States, on June 20, 1946, Robert A. Waring, Esq., appearing on behalf of Petitioner and A. J. Hurley, Esq. (Honorable J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue), appearing on behalf of Respondent.

Before any witness was called, it was stipulated

that the testimony of Mr. Messer, Mr. Osgood and Mr. Miller be incorporated in the record in the Hoofnel case, as it had just been presented in the consolidated hearing in the cases of Michael Downs and Eleanor J. Downs (husband wife), Tax Court Docket numbers respectively, 9643 and 9644.

Stipulations of facts between counsel for petitioner and respondent were received by the Court, in evidence as Petitioner's Exhibit No. 1. [58]

Whereupon,

MAURICE VERNER MILLER

was called as witness for respondent and testified that he was then acting British Vice-Consul in the British Consulate General at Los Angeles; that the principal part of his work is issuance of visas to American citizens for travel to the British Isles. Being shown a copy of a visa issued to an employee of Lockheed Overseas Corporation, he was asked if such visa permitted the holder thereof to remain indefinitely in the British Isles. He replied that visa would permit the holder to remain for the purpose for which it was given as an employee of Lockheed, and if Lockheed terminated the work over there, he would be expected to depart within a reasonable time when transport was available, and subject to any extensions that might be given him by the home office in London, or local authorities in Belfast.

BELMONT WESLEY MESSER,

called as witness for petitioner, testified in part as follows:

At the time of the organization of the group of Lockheed Overseas men that went over to Britain and Ireland, my position was that of manager of the Industrial Relations department of Lockheed Overseas Corporation. Before we left to go overseas, it was necessary to employ about three thousand men between the middle of January and the first of July, 1942. We were very much under the direction of the Army. It became necessary for us to appeal to organizations throughout the United States in order to obtain the very specialized types of mechanics that we needed. We went into the engine factories back east, and watch repair plants for skilled instrument people, and at that time received cooperation in the [59] form of telegrams from General Arnold to practically all manufacturers in the United States to release to us such essential personnel as we felt we needed. The base in Ireland had a much wider scope than simply maintenance. In fact, as we went along it became more and more of a modification base. As the aircraft that were developed in this country were sent to the war fronts, and put into operation, it was determined that under flying conditions and under actual wartime conditions, several weaknesses existed. As these men returned from missions, bombing missions and all sorts of flying missions over Europe, the faults of aircraft as produced in this

country were determined, and it was the responsibility of our base, in behalf of the Eighth Air Forec and Ninth Air Force, to redesign and rebuild as necessary the aircraft that was being sent to us to the Army, in order to make them maximumly effective in service. That made the base very much subject to bombing by the German fliers. Due to the nature of the project, and the uncertainty of people returning, we were instructed by the management of the corporation to make the picture to the individuals about to be employed as black as possible. We knew we were going over there at the time when the submarine hazard was the greatest during the entire war. Our contracts stipulated that we were more or less on our own, if taken prisoner, and at the time the men were going over we pointed out to them the possibility of being taken prisoner or being bombed, or being sunk by a submarine, was very serious.

I was in North Ireland from approximately June 26th of 1942 continuously until the first part of July, 1944. The project was referred to as Operation Magnet. The total number of American [60] citizens at any one time on the base was in the vicinity of three thousand. The total number of employees, counting those who came over and returned before the completion, brought the total number of people who went to the project and returned, to approximately five thousand and four hundred.

Whereupon,

LEWIS R. OSGOOD,

called as a witness for and on behalf of the Petitioner, having been first duly sworn, was examined and testified as follows:

When the Lockheed Overseas group was being organized early in 1942, I was Personnel division supervisor for them (under Mr. Messer). Personally, in the early part of 1942 and approximately in May, I was sent east for a short period to interview a number of applicants in the various aircraft and accessory plants, and our instructions were to paint rather a black picture, or one which indicated the possibilities, so that they would understand, and discourage anyone who might be there just for the trip, although this first contract they were signing was for only six months. In our interview, however, we got their reaction to a longer period of time, as the form which has been produced before the court notes, and in our conversation we were not interested, would not employ anyone who was not interested in staying at least a year, and if there was an indication of a return even at that time, we were somewhat doubtful because we felt that it was a long term project.

J. GERBER HOOFNEL,

called as a witness for and on behalf of his petition, having been first duly sworn, was examined and testified as follows: [61]

We got on the boat on June 30th (1942), and we could not get off—were restricted to the boat and could not communicate with anyone from it. It was a boat under British registry with British officers. When I went over I wanted to stay over there as long as was necessary. In fact, I did not know how long I would be there when I left. Lockheed gave us a form to fill out before leaving the United States at the time we were employed. I believe one question on there asked was "Will you stay one year, two years, or longer?" and I checked the place on that form where it said "or longer,"—in other words, my intention was to stay as long as was necessary, for the duration of the war. I signed an application and agreement that I would do that.

After landing in Liverpool, we went to a small base at, I believe the name of the town was Glazebrook, England. The base in North Ireland had not been finished, at the time of our arrival, all the huts had not been erected, streets had not been laid. It was just a mudhole and the houses had to be built before we could go there, so we stayed in England for about two weeks or longer before we were transferred then over to the main base in Ireland. At the time we arrived there the houses were not completed at all, the streets were not laid—we waded in mud clear up to our knees. As I understood the situation, the British government was supposed to have let a contract for the completion of these buildings—However, the buildings were not completed, or the streets laid, and other construction

work done. The men on the base, the Americans, had to help in finishing the completion of this base. It took several months before it was finally completed. [62]

While overseas I was secretary to Mr. B. W. Messer. I was never asked by the British government or the Irish government to pay any income tax while I was over there. The contract we signed with Lockheed stipulated that if the British government called upon us for taxes, that Lockheed would pay said tax. No official of the treasury department or of Lockheed withheld any of my income impounded in the United States after June, 1943. Nothing was withheld until I came back and landed in the United States.

It was necessary that I have an occupational deferment when I left the United States in 1942 and secure a permit from my draft board to leave and remain outside of the country for six months and the permit had to be renewed every six months, but the company home office in Burbank took care of that.

We lived on this base provided by Lockheed. One of the reasons for that, amongst other reasons, was, we were subject to being called to duty 24 hours per day, and it was quite necessary that we be close to our place of employment. It was my intention to return to the United States as soon as my work with Lockheed in the British Isles was complete, and I never at any time intended to stay in North Ireland.

Whereupon the income tax returns of J. Gerber Hoofnel for the period commencing June 30, 1942, and ending January 1, 1943, and for the calendar year 1943, were introduced by respondent and received in evidence by the Court as Respondent's Exhibits A and B.

Approved:

/s/ J. P. WENCHEL, CAR.

Received and filed March 26, 1947. [63]

United States Circuit Court of Appeals
for the Ninth Circuit

Docket No. 9117

J. GERBER HOOFNEL,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITIONER'S DESIGNATION OF CONTENTS OF RECORD ON REVIEW

Petitioner hereby designates for inclusion in the record on review in the above-entitled proceeding, the following:

The complete record of all the proceedings and evidence taken before The Tax Court of the United States and all matters required by Subdivision (g)

of Rule 75 of the Federal Rules of Civil Procedure; excepting exhibits filed as evidence, but including the statement of evidence in this cause heretofore prepared, served and filed.

Dated: March 8, 1947.

/s/ ROBERT A. WARING,
Attorney for Petitioner.

No counter designation will be filed.

Service admitted March 21, 1947.

/s/ J. P. WENCHEL, CAR

Received and filed T.C.U.S. March 26, 1947. [64]

Tax Court of the United States

Docket No. 9117

J. GERBER HOOFNEL,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CERTIFICATE

I, Victor S. Mersch, clerk of The Tax Court of the United States, do hereby certify that the foregoing pages, 1 to 64, inclusive, contain and are a true copy of the transcript of record, papers, and

proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of The Tax Court of the United States, at Washington, in the District of Columbia, this 9th day of April, 1947.

[Seal] /s/ VICTOR S. MERSCH, E.M.T.
Clerk, The Tax Court
of the United States.

[Endorsed]: No. 11593. United States Circuit Court of Appeals for the Ninth Circuit. J. Gerber Hoofnel, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Upon Petition to Review a Decision of The Tax Court of the United States.

Filed April 22, 1947.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

No. 11593.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

J. GERBER HOOFNEL,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITIONER'S OPENING BRIEF.

ROBERT A. WARING,
412 West Sixth Street, Los Angeles 14,
Attorney for Petitioner.

Parker & Company, Law Printers, Los Angeles. Phone TR. 5206.

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IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

J. GERBER HOOFNEL,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITIONER'S OPENING BRIEF.

Preliminary Statement.

This case was stipulated to be tried before the Tax Court with that of *Michael Downs v. Commissioner*, No. 11578 herein, as the basic facts are identical. These are in effect test cases involving hundreds of men employed at the Lockheed Overseas base in Ireland during the world war. Action has been suspended by the Treasury Department in many of these cases pending outcome herein.

Jurisdiction.

The Commissioner of Internal Revenue, Respondent herein, on August 31, 1945, acting through the Collector of the Sixth District of California at Los Angeles, mailed to Petitioner a notice of deficiency wherein, so far as material to this proceeding, the Respondent proposed ad-

ditional income taxes for the calendar year 1943 in the sum of $1311.01. [R. 7-10.]

Within the ninety day period, Petitioner, pursuant to Section 272(a), Internal Revenue Code, filed a petition with the Tax Court of the United States wherein it was alleged, among other things, that in determining the net income for the year 1943, the Commissioner and Revenue Agent in Charge erroneously included the sum of $2600 earned in the year 1942 and $5262.50 earned in the year 1943 by taxpayer outside of the United States while a bona fide resident of North Ireland, which said action by Respondent gave rise to the asserted deficiencies in tax and was erroneous. [R. 4-7.] Issue was duly joined by Respondent's answer. [R. 10-11.] The proceedings came on for hearing on June 20, 1946, before Honorable Eugene Black, Judge of The Tax Court of the United States. [R. 75-82.] Thereafter on November 12, 1946, the Court entered its memorandum Findings of Fact and opinion [R. 49-62], and on November 13, 1946, entered its decision that there was a deficiency in income tax for the calendar year 1943 in the amount $1311.01. [R. 63.]

Pursuant to Section 1142, Internal Revenue Code, on February 10, 1947, Petitioner filed a petition for review by this honorable Court with The Tax Court of the United States, invoking jurisdiction under Section 1141 Internal Revenue Code [R. 64-71] and on February 11, 1947, served notice thereof, with copy of petition, on Respondent. [R. 71-73.] A statement of points to be relied upon was served upon Respondent on March 21, 1947, and filed March 26, 1947. [R. 73-75.]

Petitioner at all the times herein mentioned was and is a resident of the County of Los Angeles except during

the period of his employment overseas as herein set forth. He filed his income tax return for the calendar year 1943 with the Collector of Internal Revenue at Baltimore, Md., as provided in Section 53(b)(1), Internal Revenue Code, but said return was by agreement with taxpayer reviewed and audited by the Collector of Internal Revenue and by the Revenue Agent in Charge in Los Angeles, California, in the Sixth Collection District of California; and deficiency notices were issued by said Collector of said Sixth District of California. [R. 7, *et seq.*]

And, pursuant to Section 1141(b)(2) of the Internal Revenue Code, Petitioner and Respondent through their respective counsel did, on March 19, 1947, stipulate and agree to and did designate the United States Circuit Court of Appeals for the Ninth Circuit as the Court to review the above entitled cause, which stipulation was filed with the Clerk of said Court on March 21, 1947. [R. 63-64.]

Questions Involved.

The Tax Court held that Petitioner was not, during the calendar year 1943, a resident of Great Britain and North Ireland within the meaning of Section 116, Internal Revenue Code, printed in the margin of its opinion. [R. 59.]

This section exempts from income tax "an individual citizen of the United States, who establishes to the satisfaction of the Commissioner that he is a bona fide resident of a foreign country or countries during the entire taxable year." [R. 59.]

The questions raised on this appeal are:

1. What does Section 116, Internal Revenue Code, mean by "resident"?

2. Do the words "bona fide" limit the discretionary power of the Commissioner in determining whether or not the citizen is a resident to his satisfaction; or does he have the authority by the statute to determine residence regardless of the good faith of taxpayer?

3. Do Regulations 111, Sections 29.211-2, defining the term resident as used in the statute control the discretionary power of the Commissioner?

A secondary question involved in this appeal is whether or not petitioner was in effect on foreign soil, under the war conditions then existing, when he boarded on June 30, 1942, a vessel of British registry under a British captain, even though the vessel did not get away from its docks until the morning of July 1st.

We contend that the Commissioner and the Tax Court misconstrued Section 116, Internal Revenue Code, *supra,* and Regulations 111, Sections 29.211-2, *supra,* and misapplied same to the stipulated and uncontroverted evidence which is here and now as available to your Honorable Court as it was to said Commissioner and Tax Court; said facts being hereinafter set forth, to-wit:

Statement of Facts.

Early in 1942 Lockheed Aircraft Corporation (L. A. C.) entered into a contract with the United States Government to organize, equip and operate an aircraft depot at Belfast in North Ireland. [Stipulation, Ex. 2, R. 17.]

Between the middle of January and first of July, 1942, Industrial Relations Manager B. W. Messer and his assistant Lewis R. Osgood recruited about 3000 men — specialized types of mechanics from industries throughout the United States. They went into engine factories back east and watch repair plants for skilled instrument people. General Arnold (Hap Arnold) telegraphed to practically all manufacturers in the United States to release such personnel as Lockheed Overseas needed. [B. W. Messer, R. 77-78.]

This was not to be a mere maintenance base in North Ireland. It was rather to be and become a "modification" base. These men were to be near the flying base, to be in close touch with our bombers as they returned from day to day from their sorties over Europe, to re-design and re-build as necessary and overcome the faults of aircraft produced in this country; to determine under actual war conditions any weakness in our planes and immediately repair same. Obviously this made the Lockheed Irish bases very much an object for bombing by German fliers. [B. W. Messer, R. 77-78.]

Due to the nature of the project and uncertainty of the men returning, the employment force was instructed by management of the corporation to make the picture to prospective employees as dark as possible. They were to cross the Atlantic when the submarine hazard was the greatest during the entire war. The contract stipulated

that the men were more or less on their own, if taken prisoner. And the interviewers for Lockheed pointed out to these men that the possibility of being taken prisoner or being bombed, or being sunk by a submarine, was very serious. [Messer, R. 78.]

Although the first contract these men signed was for only six months, the application which these men signed and the interview with them was designed to eliminate a prospect who was not interested in staying overseas at least a year, because management then felt it was a long time project. [Lewis R. Osgood, R. 79; Application, R. 15.]

J. Gerber Hoofnel made application for foreign service on or about February 14, 1942, at Lockheed Placement Division, Burbank, California. He was then living at 501 So. Ardmore, Los Angeles, California. In answering the questions on his application he stated that he was willing to go to any part of the world and that he understood his services might be in a war combat zone and travel to this point would be hazardous. [Application, R. 15.]

From Jan. 1, 1942, to June 30, 1942, Petitioner was employed in the United States by Vega Aircraft Corporation and Lockheed Overseas Corporation as a secretary at Burbank, California. [Stipulation, R. 12.]

In May, 1942, he signed the above noted contract with Lockheed Overseas Corporation for services in the British Isles. [Ex. 2, R. 17-31.] Pursuant to said contract he embarked June 30, 1942, on H.M.S. Maloja, a vessel of British registry (at New York Harbor). The Maloja sailed from New York City early in the morning of July 1st bound for the British Isles. [Stipulation, R. 12.]

Hoofnel testified: "We got on the boat on June 30th (1942), and we could not get off—were restricted to the boat and could not communicate with anyone from it. It was a boat of British Registry with British officers. When I went over I wanted to stay over there as long as necessary. In fact, I did not know how long I would be there when I left . . . my intention was to stay as long as necessary, for the duration of the war." [R. 80.]

He first went to a base at Glazebrook, England, and after two weeks went to the base in North Ireland. [R. 80.] He was secretary to B. W. Messer. He was not asked by the British or Irish government to pay any income tax while overseas. The contract he signed with Lockheed Overseas Corporation provided that if he was taxed by the British government, Lockheed would pay same. No official of the treasury department or of Lockheed withheld any of his income impounded in the United States. Nothing was withheld until he came back and landed in the United States. [R. 81.]

Hoofnel testified that one reason for living at the base in Ireland was that the L O C men were subject to being called on duty 24 hours per day, and it was quite necessary that they be close to their place of employment. He ended his testimony thus: "It was my intention to return to the United States as soon as my work with Lockheed in the British Isles was complete, and I never at any time intended to stay in North Ireland."

As of May 1, 1943, Petitioner entered into a written contract with Lockheed in which he agreed to render such services in connection with said aircraft depot as might reasonably be assigned to him for the duration of the contract between the Government and Lockheed as from time to time extended (which meant for the duration of the war and beyond). [Ex. 3, R. 33.]

STATEMENT OF POINTS RELIED UPON.

1. The Tax Court of the United States erred in finding as a fact or deciding as a matter of law that the Commissioner of Internal Revenue had discretionary power to disregard the plain language of Regulations 111, Sections 29.211-2, and assess the tax here involved.

2. The said Tax Court erred in failing to find as a matter of fact and deciding as a matter of law that petitioner under said Sections 29.211-2 of said Regulations was a bona fide resident of the British Isles and North Ireland for the calendar year 1943, and exempt from income tax on his overseas salary of $5262.50 for that year.

3. The said Tax Court erred in finding as a fact or deciding as a matter of law that Internal Revenue Code, Section 116(a)(1) vested in the Commissioner discretionary power to determine that taxpayer was not a resident of the British Isles for the taxable year 1943, even though he acted bona fide and met the conditions of Regulations 111, Sections 29.211-2; and said Court erred in failing to find that under said section of Internal Revenue Code and under said section of said Regulations, the Petitioner was exempt from income tax on his said overseas salary.

4. The said Tax Court erred in finding as a fact or deciding as a matter of law that taxpayer was not a bona fide non-resident of the United States for more than six months during the taxable year 1942, and that the $2600 earned by him during that period should not be excluded from his 1942 income.

ARGUMENT.

If the decision of the Tax Court that petitioner was not a *bona fide* resident of Great Britain and North Ireland during the calendar year 1943 be regarded as a finding of fact, it is contrary to the uncontroverted evidence; and therefor such decision may be properly reviewed by this Honorable Court.

If this portion of the decision of the Tax Court be regarded as a conclusion of law, then it is also a proper subject of review by this Honorable Court.

Bogardus v. Commissioner, 302 U. S. 34, 58 S. Ct. 61, 82 L. Ed. 32;

Claridge Apts. Co. v. Commissioner of Internal Revenue, 89 L. Ed. 139.

Applicable Law.

Section 116, I. R. C. reads as follows:

"SEC. 116. EXCLUSIONS FROM GROSS INCOME. (As amended by sec. 148(a), Revenue Act of 942.)

In addition to the items specified in section 22(b), the following items shall not be included in gross income and shall be exempt from taxation under this chapter:

(a) EARNED INCOME FROM SOURCES WITHOUT THE UNITED STATES.—

(1) Foreign Resident for Entire Taxable year.— In the case of an individual citizen of the United States, who establishes to the satisfaction of the Commissioner that he is a *bona fide* resident of a foreign country or countries during the entire taxable year, amounts received from sources without the United

States (except amounts paid by the United States or any agency thereof) if such amounts would constitute earned income as defined in section 25(a) if received from sources within the United States; but such individuals shall not be allowed as a deduction from his gross income any deductions properly allocable to or chargeable against amounts excluded from gross income under this subsection."

Purpose and Intent of Section 116, I. R. C.

By its very wording it is plain that Congress intended that this section should have a liberal and not a narrow and restricted meaning.

To better understand this it is well to consider how this section read prior to its amendment in the latter part of 1942.

When the three thousand or more Lockheed men were employed to go overseas in the early half of 1942, the law then exempted from tax gross income to an individual citizen of the United States who was a *bona fide* non-resident of our country for more than six months during the taxable year.

In *Commissioner of Internal Revenue v. Fiske's Estate,* 128 F. (2d) 487; certiorari denied 317 U. S. 635, construing this section as it stood in 1942, the Court said:

> "It is agreed that Sec. 116(a) was intended to stimulate foreign trade, and to relieve our citizens resident in foreign countries, engaged there in the promotion of American foreign trade for more than six months of the taxable year, from tax upon the income which they earned in the foreign country. In construing the phrase *'bona fide* nonresident of the United States for more than six months during the taxable year,' the Bureau of Internal Revenue

has interpreted it as applying to any American citizen actually outside the United States for more than six months during the taxable year, and this construction finds support in the legislative history of the act."

However the Report of the Senate Committee on Finance, C. B. 1942-2, pp. 548, 549, found that:

". . . This provision of the present law has suffered considerable abuse, in the case of persons absenting themselves from the United States for more than six months simply for tax-evasion purposes."

After differences between the House of Representatives and the Senate, Congress finally enacted the present Sec. 116, *supra,* effective after December 31, 1942, requiring the citizen to establish to the satisfaction of the Commissioner that he is a *bona fide* resident of a foreign country during the entire taxable year, as shown in Revenue Act 1942, Sec. 148(a).

In light of this legislation it seems clear the words "to the satisfaction of the Commissioner" modify the words *"bona fide"* rather than change the meaning of the word resident as usually used in the taxing statutes. As an administrative measure it would seem very fitting and proper and effective for the Commissioner to determine whether or not the citizen in question be a *bona fide* resident.

There is no question about the good faith of petitioner or his Lockheed associates in absenting themselves in Europe during the war. The Tax Court warmly admits this in the following statement in the companion case of Michael Downs No. 11578 in this Court:

"We agree that the good faith of petitioner in going overseas as an employee of Lockheed, and ren-

> dering important and essential services to the war effort cannot be questioned. We do not understand that it is being questioned by the Commissioner." [R. 65.]

It being agreed that there is no question of *bona fides* involved in this case, the next question is does Sec. 116, I. R. C., *supra,* vest the Commissioner with discretion to modify or vary the well established rules of law and the Regulations that define what constitutes residence. Put it another way, in absence of any question of *bona fides,* do the words "to the satisfaction of the Commissioner" nevertheless attach to or modify the word "residence" as used in 116 I. R. C., *supra?*

We contend that the amendment to that section of the Revenue law was intended as an administrative measure to enable the Commissioner to limit the exemption from tax to citizens residing abroad in good faith and not for tax evasion. We contend that there is no intent to substitute the mind of the Commissioner for the ordinary rules of evidence that determine residence. Where the facts are uncontroverted as they are here, your Honorable Court, being fully advised upon the law, is free to determine the question of residence here involved without any handicap created by the mind of the Commissioner.

In *Commissioner of Internal Revenue v. Swent,* 155 F. (2d) 513, at 515, the Court says:

> "The word 'resident' (and its antonym 'nonresident') are very slippery words, which have many and varied meanings. Sometimes, in statutes, residence means domicile; sometimes, as in the instant case, it clearly does not. When these words, 'domicile' and 'residence,' are technically used by persons skilled

in legal semantics, their meanings are quite different. This distinction is clearly set out in Matter of Newcomb's Estate, 192 N. Y. 238, 250, 84 N. E. 950, 954:

"'As domicile and residence are usually in the same place, they are frequently used, even in our statutes, as if they had the same meaning, but they are not identical terms, for a person may have two places of residence, as in the city and country, but only one domicile. Residence means living in a particular locality, but domicile means living in that locality with intent to make it a fixed and permanent home. Residence simply requires bodily presence as an inhabitant in a given place, while domicile requires bodily presence in that place and also an intention to make it one's domicile.'

"We think the error into which the Tax Court fell was partially caused by a confusion of these terms in lending to the word 'residence' some attributes which really belong only to the word 'domicile,' and by laying too great stress, as to 'residence,' on the *animus revertendi.*"

The Tax Court further erred in resting its decision in this case largely upon its decision made, just previously the same day, in *Arthur J. H. Johnson v. Commissioner*, 7 T. C. No. 122, because the cases are clearly distinguishable. Johnson went to Greenland with no such commitments and no such contract as petitioner had with L. O. C. A treaty with Denmark gave the United States Government peculiar jurisdiction over the territory in which it operated in Greenland. The dissenting opinion of Judge Leech in that case very well answers the position of the majority that the taxpayer, in order to claim residence

abroad, must show payment of tax there. Says the dissent:

> ". . . Neither Congress in the controlling statutory provision, nor the respondent in his regulations construing that provision, mentions such exemption as even affecting, much less controlling, the imposition of the contested tax. That it would have been easy to have done so is obvious. For us to interpolate such criterion seems to me to be judicial legislation."

Regulations 111, Sec. 29.211-2 Remove Any Doubt About the Meaning of the Term "Residence."

If there were any doubt about the meaning of the term residence in Sec. 116, I. R. C., it is clearly removed by definition in Regulation 111, Sec. 29.211-2 which reads as follows:

An alien actually present in the United States who is not a mere transient or sojourner is a resident of the United States for purposes of the income tax. Whether he is a transient is determined by his intentions with regard to the length and nature of his stay. A mere floating intention, indefinite as to time, to return to another country is not sufficient to constitute him a transient. If he lives in the United States and has no definite intention as to his stay he is a resident. One who comes to the United States for a definite purpose which in its nature may be promptly accomplished is a transient; but if his purpose is of such a nature that an extended stay may be necessary for its accomplishment, and to that end the alien makes his home temporarily in the United States, he becomes a resident, though it may be his intention at all times to return to his domicile abroad when the purpose for which he came has been consummated or aban-

doned. An alien whose stay in the United States is limited to a definite period by the immigration laws is not a resident of the United States within the meaning of this section, in the absence of exceptional circumstances.

Regulations 111, Sec. 29.116-1 provides in part . . . "Whether the individual citizen of the United States is a bona fide resident of a foreign country shall be determined in general by the application of the principle of Sec. 29.211-2 . . ."

Having admitted that the Commissioner is bound by Sec. 29.211-2 *supra,* nevertheless the Tax Court decided against petitioner largely on the Commissioner's interpretation of 116 I. R. C. in I. T. 3642 Cum. Bull. 1944, page 262, saying that "if the construction given in I. T. 3642 *supra* was wrong, it should be given no weight, but we are not convinced it was wrong."

We agree that the decision of the Commissioner in I. T. 3642 *supra,* was not wrong. It was right because in that case a citizen of the United States, who went to Canada on January 1, 1943, where he was employed on a war project, intended to stay only until May 1944,— a fixed time of just over a year. He was clearly a transient as defined in Regulations 111, Sec. 29.211-2 *supra.*

But by this same section of Regulations (Hoofnel) was not a transient. He was a resident overseas for the full year 1943. He went overseas for an uncertain period as prescribed in said section of Regulations. The period was uncertain all through 1943 for he intended to stay for the duration of the war and beyond. The duration of the war was then emphatically uncertain for the Belgian Bulge had not yet taken place and no one knew when our Americans overseas would come back or if they ever would come back.

He was over there temporarily, as the Section prescribes, but his purpose was of such a nature that an extended stay might have been necessary for its accomplishment. And so in the language of the Section he became a resident over there even though it was his intention at all times to return to his domicile when the purpose for which he came had been consummated or abandoned.

Secondary Point on Appeal.

The Tax Court in its opinion correctly states the final question involved in this appeal as follows:

> ". . . the question whether petitioner was absent from the United States for more than six months in 1942 depends upon the answer to a simple question of law, namely: Is an American citizen 'outside the United States' when he is aboard a vessel belonging to a foreign Government tied to a pier in New York harbor? Petitioner boarded a British steamer in New York harbor on June 30, 1942, bound for the British Isles. After he boarded the British vessel he was kept there and was not allowed to communicate with anyone on the outside. This was on account of guarding against submarine danger. The vessel, however, did not sail until the morning of July 1, 1942."

We contend that the hazards of war should be taken into consideration in this case. The Court well knows that vessels of the Allies leaving American ports did not dare reveal any detail of their departures because of the terrifying menace of the German submarine warfare. The ordinary rules of port were not being observed. Petitioner was to all intents and purposes completely under the jurisdiction of the British officers and they, under the necessary rules of the war, were independent in their actions.

Conclusion.

As noted in the beginning of this brief, this case of J. Gerber Hoofnel and the companion case of Michael Downs 11578 are in fact test cases involving many of the men who were recruited by Lockheed Overseas Corporation in the first half of 1942, to make an extraordinary contribution to the success of our war effort.

Untold penalty will be imposed upon many of these men under the construction urged by Respondent. We do not ask for any strained construction of the law and Regulations involved but do seek an interpretation fair to them and consistent with the history of the legislation and of the administration of the statute involved.

When, after these men went overseas, Sec. 116 I. R. C. was amended, admitted to prevent persons not acting *bona fide,* from easy evasion of the income tax. No effort was made to clarify the meaning of the term residence; no effort was made to require declaration of intent to change citizenship; no effort in fact was made to give this law any such interpretation as Respondent would here urge.

We respectfully urge:

That Your Honorable Court, in accord with the prayer of the petition herein, determine that there is no deficiency due from petitioner on his income for the calendar year ending December 31, 1943.

Respectfully submitted,

ROBERT A. WARING,

Attorney for Petitioner.

No. 11593

In the United States Circuit Court of Appeals for the Ninth Circuit

J. GERBER HOOFNEL, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ON PETITION FOR REVIEW OF THE DECISION OF THE TAX COURT OF THE UNITED STATES

BRIEF FOR THE RESPONDENT

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CITATIONS

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In the United States Circuit Court of Appeals for the Ninth Circuit

No. 11593

J. Gerber Hoofnel, petitioner

v.

Commissioner of Internal Revenue, respondent

ON PETITION FOR REVIEW OF THE DECISION OF THE TAX COURT OF THE UNITED STATES

BRIEF FOR THE RESPONDENT

OPINION BELOW

The only previous opinion in this case is that of the Tax Court (R. 49–62) which is reported in 7 T. C. 1136.

JURISDICTION

This petition for review involves a deficiency in income tax of the petitioner (hereinafter referred to as the taxpayer) for the year 1943 in the amount of $1,311.01. (R. 63, 64–71.)

On August 31, 1945, the Commissioner of Internal Revenue mailed to the taxpayer a notice of deficiency. (R. 7–10.) Within 90 days thereafter, namely, on September 10, 1945 (R. 2), the taxpayer filed with the Tax Court a petition (R. 4–10) for a redetermination

of the deficiency, pursuant to Section 272 of the Internal Revenue Code. On November 13, 1946, the Tax Court entered its decision, sustaining the deficiency determined by the Commissioner. (R. 63.) Within three months after that decision, namely, on February 10, 1947 (R. 3), the taxpayer filed his petition (R. 64–71) for a review of the decision of the Tax Court, pursuant to the provisions of Sections 1141–1142 of the Internal Revenue Code. By stipulation in writing (R. 63–64) the parties herein have designated this Court as the court for review.

QUESTIONS PRESENTED

1. Was the taxpayer a bona fide resident of a foreign country or countries during the taxable year 1943 and thus entitled, under Section 116 (a) of the Internal Revenue Code as amended by Section 148 of the Revenue Act of 1942, to an exemption for salary received from sources without the United States?

2. Taxpayer boarded a British vessel anchored in New York harbor on June 30, 1942. The vessel did not sail until the morning of July 1, 1942, and the taxpayer landed in the British Isles later in July of 1942. Under these circumstances, was the taxpayer a bona fide nonresident of the United States for more than six months of the year 1942 within the meaning of Section 116 of the Internal Revenue Code prior to its amendment by Section 148 of the Revenue Act of 1942?

STATUTE AND REGULATIONS INVOLVED

The statute and Regulations involved are set forth in the Appendix, *infra,* pp. 12–16.

STATEMENT

The facts as stipulated (R. 11–14) and as found by the Tax Court (R. 51–58) are as follows:

Taxpayer is a single man, a citizen of the United States residing in Los Angeles, California. Taxpayer timely filed income tax returns for the taxable years 1942 and 1943 with the Collector of Internal Revenue for the District of Maryland. (R. 51–52.)

Early in 1942 Lockheed Aircraft Corporation entered into a contract with the United States Government in which the corporation agreed to organize, equip and operate an aircraft depot in Northern Ireland in connection with the war effort. The project was designated by the United States Army as operation "Magnet". In connection with the operation it was necessary for the Lockheed Aircraft Corporation and its subcontractor, Lockheed Overseas Corporation, sometimes hereafter referred to as Lockheed, to employ large numbers of skilled men in the United States and transport them to the British Isles. It was estimated that some 5,400 American citizens at one time or another were employed by Lockheed at the aircraft depot in Northern Ireland. (R. 52.)

From January 1, to June 30, 1942, taxpayer was employed as a secretary by Vega Aircraft Corporation and by Lockheed at Burbank, California. During that time he received a salary amounting to $1,418.59. (R. 52.)

On or about February 18, 1942, taxpayer made out and signed a formal application for overseas employment with Lockheed and in connection with such application signed a contract shortly thereafter with the

corporation in which he agreed to perform services for the company at an aircraft depot to be operated by it in the British Isles. The application which taxpayer signed for employment with Lockheed was headed: "Application For Foreign Service." The application contained the following question (R. 53):

> Are you willing to go to any part of the world?
>
> Yes.
>
> For how long? 1 year. 2 years. Longer X.

Taxpayer in his application for foreign service thus indicated a willingness to serve as an employee of Lockheed overseas for more than two years, if necessary. The contract provided, *inter alia,* as follows (R. 53–55):

> ARTICLE 1. TIME AND DURATION OF EMPLOYMENT.
>
> Contractor employs Employee to render services in connection with said aircraft depot with such duties as reasonably may be assigned to him, and Employee accepts such employment with knowledge of the conditions recited above. Subject to the terms and conditions hereinafter set forth, Employee's employment hereunder shall commence when he reports for duty at a point within the United States to be designated by Contractor, at the time and place designated by Contractor, and shall continue until Novemmer 1, 1942, or such later date as may be agreed upon and thereafter until sixty (60) days after return transportation to the United States is made available by Contractor, it being understood that such return transportation shall be

made available on November 1, 1942, or the later date agreed upon or as soon thereafter as is practicable under the circumstances then existing.

* * * * *

ARTICLE 7. HOUSING, SUBSISTENCE AND MEDICAL SERVICES.

During the time that Employee is employed hereunder and remains at the place or places of his duty outside of the United States, Contractor shall furnish or cause to be furnished, without cost to Employee, such adequate food, lodging, special clothing and equipment, medical, nursing, and hospital services and treatment and recreational facilities as circumstances may reasonably permit.

Employee shall submit prior to departure and from time to time during his employment to such vaccination, inoculation, and/or any other medical, dental, surgical, nursing, and/or hospital treatment, preventative or curative, as the Contractor or other medical staff at the destination or elsewhere may from time to time specify, without expense to Employee.

Contractor may direct the return to the United States of Employee, if in Contractor's judgment Employee's health condition is unfavorable.

* * * * *

ARTICLE 9. TAXES.

Contractor shall either pay or reimburse Employee for any and all taxes lawfully levied or assessed by any foreign Government against Employee with respect to his residence, occupation, salary, or income, provided, however, that Employee shall immediately notify Con-

> tractor in writing of any such levy or assessment and that Employee shall not pay any of such taxes as Contractor may direct him not to pay and that any claim for reimbursement shall be asserted in writing to Contractor within thirty (30) days after such payment, and provided further that Contractor shall save Employee harmless from any monetary loss resulting from or occasioned by Employee's failure to pay such taxes in compliance with instructions or directions given by Contractor.

Pursuant to the terms of his contract, taxpayer on June 30, 1942, boarded the H. M. S. *Maloja,* a vessel of British registry and under a British captain and officers, berthed in New York harbor. Because of the danger of German submarines, Hoofnel was not allowed any contacts with the mainland after he boarded the vessel. The *Maloja,* with taxpayer aboard, sailed from New York harbor early on the morning of July 1, 1942, bound for the British Isles. Taxpayer landed in Liverpool, England. (R. 55.)

Taxpayer was admitted to the British Isles on a visa as an employee of Lockheed. This visa, under British law, had to be put in use within three months from the date it was issued but the time that the holder would be allowed to stay is not mentioned therein. The visa, under British law, would permit him to remain for the purpose for which it was given, as an employee of Lockheed, and if and when Lockheed terminated its work over there, taxpayer would be expected to depart within a reasonable time when transport was available and subject to any extensions

that might be given him by the home office in London or local authorities in Belfast. (R. 55–56.)

After disembarking, taxpayer was first assigned to a small base near Glazebrook, England, for several weeks, after which he was transferred to the main base in Ireland. (R. 56.)

The expiration date of taxpayer's contract was extended by agreement of the parties until May 1, 1943, at which time he entered into a new contract with Lockheed Overseas Corporation. This new contract provided, *inter alia,* as follows (R. 56–57):

> ARTICLE 1. TIME AND DURATION OF EMPLOYMENT.
>
> Contractor employs Employee to render services in connection with said aircraft depot with such duties as reasonably may be assigned to him, and Employee accepts such employment with knowledge of the conditions recited above. The term of Employee's employment hereunder shall * * * continue, subject to the terms and conditions hereinafter set forth, for (i) the duration of the contract between the Government and Lockheed as from time to time extended and for such period after the termination or completion of said contract as Contractor may, in respect of such Employee, deem necessary for the winding up of the operations carried on under said contract after such termination or completion; and (ii) thereafter until return transportation to the United States for such Employee is made available by Contractor or by the Government to Contractor which transportation Contractor shall use its best efforts to obtain as promptly after the end

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> of the period described in the foregoing clause (i) as is practicable under the circumstances then existing; * * *

The taxpayer remained in the employ of Lockheed stationed in Northern Ireland until July 13, 1944, when he returned to the United States. (R. 57.)

Taxpayer received as compensation for personal services rendered to Lockheed in the British Isles and Northern Ireland during the year 1942 the sum of $2,600 and during 1943 the sum of $5,262.50, of which sums 90 per cent was deposited by the corporation to the account of the taxpayer with the Bowling Green Trust Company, Bowling Green, Kentucky, pursuant to Article 2 of his employment contract. (R. 57.)

Taxpayer did not at any time make any application to become a citizen of Northern Ireland, or a British subject. During the taxable year 1943 he was domiciled in the United States and his intentions were to remain in Ireland not longer than the duration of the war or until his employment with Lockheed Overseas Corporation terminated, at which time he intended to return to the United States. He did not pay any income taxes to the Government of Northern Ireland or to the United Kingdom of Great Britain. (R. 57–58.) Taxpayer stated on both his returns for 1942 and 1943 as follows (R. 58):

> Taxpayer claims exemption from Federal Income Tax for the period June 30, 1942, to July 12, 1944, for the reason that during that period he was a resident of the British Isles and North Ireland within the meaning of the Revenue Code and of Sec. 116 thereof and as the term

resident is defined in Regulations 111 Sec. 29.211–2.

Taxpayer embarked on June 30, 1942, on H. M. S. *Maloja* bound for British Isles and Ireland, where he remained a resident until his return to New York City on July 12, 1944.

When he applied to Lockheed for the above employment he intended to and promised them he would remain in their overseas service as long as their contract with the U. S. Army required for the duration of the war and as long thereafter as needed: He had no definite intentions as to his stay overseas other than as above stated; he did not know or plan when he might be able to return because of the uncertainty of the duration of the war.

The Tax Court concluding (1) that the taxpayer during the taxable year 1943 was not "a bona fide resident of a foreign country or countries" within the meaning of Section 116 (a) of the Internal Revenue Code as amended by Section 148 of the Revenue Act of 1942, and (2) that the taxpayer was not a bona fide nonresident of the United States for more than six months during the taxable year 1942 and that the amounts received by him as compensation sources within the British Isles was includible in ~~the~~ income for 1942, determined the deficiency in income tax which is here in controversy.

ARGUMENT

The first question presented in this case is the same question which is presented to this Court in *Downs* v. *Commissioner,* No. 11578, and is presented upon indistinguishable facts. For the sake of convenience

and brevity the respondent adopts and incorporates herein by reference the argument made on behalf of the respondent in his brief in *Downs* v. *Commissioner, supra.*

Upon the second question, the taxpayer (Br. 16) argues that notwithstanding the taxpayer's physical presence within the United States for more than six months during the taxable year 1942, he should nevertheless be considered to have been a bona fide nonresident of the United States for more than six months of the taxable year 1942. This contention is based upon the single consideration that the taxpayer boarded an English vessel lying at anchor in New York harbor, but destined for the British Isles, on June 30. It is suggested that the taxpayer's physical presence within the United States should be disregarded and that the taxpayer should be deemed to have departed from the United States at the time of his boarding of the vessel. It is contended that because of the menace of German submarines and the consequent security necessities, the ordinary rules of the port were not being observed and for that reason the taxpayer should be deemed to have departed the United States at the time of his boarding the vessel. No authority is cited as supporting this view and we suggest that there is none. Congress in enacting Section 116 of the Internal Revenue Code laid down an inflexible basis for the granting of the exemption therein contained, i. e., six months' physical absence from the United States. The taxpayer did not meet this test for the taxable year 1942 and, while the

taxpayer's *ad hominem* argument on the point has some appeal to the equities of the situation, the decision of the Tax Court on this point represents a proper application of the statute.

CONCLUSION

The decision of the Tax Court should be affirmed.
Respectfully submitted.

THERON L. CAUDLE,
Assistant Attorney General.

SEWALL KEY,
BERRYMAN GREEN,
Special Assistants to the Attorney General.

AUGUST, 1947.

APPENDIX

Internal Revenue Code:

SEC. 116 [as amended by the Revenue Act of 1942, c. 619, 56 Stat. 798, Sec. 148 (a)]. EXCLUSIONS FROM GROSS INCOME.

In addition to the items specified in section 22 (b), the following items shall not be included in gross income and shall be exempt from taxation under this chapter:

(a) *Earned Income From Sources Without the United States.*—

(1) *Foreign Resident for Entire Taxable Year.*—In the case of an individual citizen of the United States, who establishes to the satisfaction of the Commissioner that he is a bona fide resident of a foreign country or countries during the entire taxable year, amounts received from sources without the United States (except amounts paid by the United States or any agency thereof) ~~in~~ such amounts would constitute earned income as defined in section 25 (a) if received from sources within the United States; but such individual shall not be allowed as a deduction from his gross income any deductions properly allocable to or chargeable against amounts excluded from gross income under this subsection.

(2) *Taxable Year of Change of Residence to United States.*—In the case of an individual citizen of the United States, who has been a bona fide resident of a foreign country or countries for a period of at least two years before the date on which he changes his residence from such country to the United States, amounts received from sources without the United States (except amounts paid by the United States or any

agency thereof), which are attributable to that part of such period of foreign residence before such date, if such amounts would constitute earned income as defined in section 25 (a) if received from sources within the United States; but such individual shall not be allowed as a deduction from his gross income any deductions properly allocable to or chargeable against amounts excluded from gross income under this subsection.

* * * * *

(26 U. S. C. 1940 ed., Sec. 116.)

Treasury Regulations 111, promulgated under the Internal Revenue Code:

SEC. 29.116–1.[6] *Earned Income From Sources Without the United States.*—For taxable years beginning after December 31, 1942, there is excluded from gross income earned income in the case of an individual citizen of the United States provided the following conditions are met by the taxpayer claiming such exclusion from his gross income: (a) It is established to the satisfaction of the Commissioner that the taxpayer has been a bona fide resident of a foreign country or countries throughout the entire taxable year; (b) such income is from sources without the United States; (c) the income constitutes earned income as defined in section 25 (a) if received from sources within the United States; and (d) such income does not represent amounts paid by the United States or any agency or instrumentality thereof. Hence, a citizen of the United States taking up residence without the United States in the course of the taxable year is not entitled to such exemption for such taxable year. However, once bona fide residence in a foreign coun-

[6] This section was amended by T. D. 5373, 1944 Cum. Bull. 143, in respects not material to the instant case.

try or countries has been established, temporary absence therefrom in the United States on vacation or business trips will not necessarily deprive such individual of his status as a bona fide resident of a foreign country. Whether the individual citizen of the United States is a bona fide resident of a foreign country shall be determined in general by the application of the principles of sections 29.211–2, 29.211–3, 29.211–4, and 29.211–5 relating to what constitutes residence or nonresidence, as the case may be, in the United States in the case of an alien individual.

* * * * *

SEC. 29.211–2. *Definition.*—A "nonresident alien individual" means an individual—

(a) Whose residence is not within the United States;

(b) Who is not a citizen of the United States. The term includes a nonresident alien fiduciary.

An alien actually present in the United States who is not a mere transient or sojourner is a resident of the United States for purposes of the income tax. Whether he is a transient is determined by his intentions with regard to the length and nature of his stay. A mere floating intention, indefinite as to time, to return to another country is not sufficient to constitute him a transient. If he lives in the United States and has no definite intention as to his stay, he is a resident. One who comes to the United States for a definite purpose which in its nature may be promptly accomplished is a transient; but if his purpose is of such a nature that an extended stay may be necessary for its accomplishment, and to that end the alien makes his home temporarily in the United States, he becomes a resident, though it may be his intention at all times to return to his domicile abroad when the purpose for which he came has been consummated or abandoned. An alien whose

stay in the United States is limited to a definite period by the immigration laws is not a resident of the United States within the meaning of this section, in the absence of exceptional circumstances.

* * * * *

SEC. 29.211–4. *Proof of Residence of Alien.*— The following rules of evidence shall govern in determining whether or not an alien within the United States has acquired residence therein within the meaning of chapter 1. An alien, by reason of his alienage, is presumed to be a nonresident alien. Such presumption may be overcome—

(1) In the case of an alien who presents himself for determination of tax liability prior to departure for his native country, by (a) proof that the alien, at least six months prior to the date he so presents himself, has filed a declaration of his intention to become a citizen of the United States under the naturalization laws, (b) proof that the alien, at least six months prior to the date he so presents himself, has filed Form 1078 or its equivalent, or (c) proof of acts and statements of the alien showing a definite intention to acquire residence in the United States or showing that his stay in the United States has been of such an extended nature as to constitute him a resident;

(2) In other cases by (a) proof that the alien has filed a declaration of his intention to become a citizen of the United States under the naturalization laws, (b) proof that the alien has filed Form 1078 or its equivalent, or (c) proof of acts and statements of an alien showing a definite intention to acquire residence in the United States or showing that his stay in the United States has been of such an extended nature as to constitute him a resident.

In any case in which an alien seeks to overcome the presumption of nonresidence under

(1) (c) or (2) (c), if the internal-revenue officer who examines the alien is in doubt as to the facts, such officer may, to assist him in determining the facts, require an affidavit or affidavits setting forth the facts relied upon, executed by some credible person or persons, other than the alien and members of his family, who have known the alien at least six months prior to the date of execution of the affidavit or affidavits.

SEC. 29.211–5. *Loss of Residence by Alien.*— An alien who has acquired residence in the United States retains his status as a resident until he abandons the same and actually departs from the United States. An intention to change his residence does not change his status as a resident alien to that of a nonresident alien. Thus, an alien who has acquired a residence in the United States is taxable as a resident for the remainder of his stay in the United States.

U. S. GOVERNMENT PRINTING OFFICE: 1947

No. 11593.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

J. GERBER HOOFNEL,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ON PETITION FOR REVIEW OF THE DECISION OF THE TAX COURT OF THE UNITED STATES

REPLY BRIEF FOR PETITIONER.

ROBERT A. WARING,
412 West Sixth Street, Los Angeles 14,
Attorney for Petitioner.

Parker & Company, Law Printers, Los Angeles. Phone TR. 5206.

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Preliminary Statement.

The first question presented in this case is the same question which is presented to this Court in *Downs v. Commissioner,* No. 11578, and is presented upon indistinguishable facts. For the sake of convenience and brevity the petitioner adopts and incorporates herein by reference the argument made on behalf of the petitioner in his brief in *Downs v. Commissioner, supra.*

As to second question in this case, petitioner has nothing to add to what he has said in his opening brief.

Conclusion.

The decision of the Tax Court should be reversed.

Respectfully submitted,

ROBERT A. WARING,
Attorney for Petitioner.

September 3, 1947.

No. 11594

United States

Circuit Court of Appeals

For the Ninth Circuit.

THE ATTORNEY GENERAL OF THE UNITED STATES,

Appellant,

vs.

WILLIAM WADE RICKETTS,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the Eastern District of Washingon, Northern Division

Rotary Colorprint, 870 Brannan Street, San Francisco 6-26-47—60

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS OF RECORD

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Attorney for Plaintiff-Appellee.

HARVEY ERICKSON,
United States Attorney,

FRANK R. FREEMAN,
Assistant United States Attorney,
334 Post Office Building,
Spokane, Washington,
Attorneys for Defendant-Appellant.

In the District Court of the United States in and for the Eastern District of Washington, Northern Division.

No. 460.

WILLIAM WADE RICKETTS,

Plaintiff,

vs.

THE ATTORNEY GENERAL OF THE UNITED STATES,

Defendant.

PETITION FOR DECLARATORY JUDGMENT

Petitioner shows to this Honorable Court:

1.

That your petitioner is a resident of the City of Spokane, County of Spokane, State of Washington which is within the jurisdiction of the above entitled Court.

2.

That this petition is brought pursuant to Section 502 of Nationality Act of 1940, 8 U. S. C. A., Section 903.

3.

That your petitioner was born at Hydro, Oklahoma, which was and is one of the States of the United States, on the 3rd day of February, 1902.

4.

That his father was Siegel Ricketts, who was born in the State of Indiana which was and is one of the

States of the United States, and this his mother was Emma Shepard prior to her marriage to his father, who was born at Peoria, Illinois, which was and is one of the States of the United States. That ever since his birth your petitioner was and now is a citizen of the United States of America, and as aforesaid is now residing at Spokane, County of Spokane, State of Washington.

5.

That the defendant erroneously contends and asserts [1*] that your petitioner is an alien subject to deportation.

Wherefore your petitioner prays for a judgment of this Court adjudging him to be a citizen of the United States of America and declaring him to be entitled to all the rights, privileges and immunities guaranteed citizens of the United States of America under its Constitution and laws.

GEO. W. YOUNG,
Attorney for the Plaintiff.

State of Washington,
County of Spokane—ss.

William Wade Ricketts, being first duly sworn, upon oath deposes and says: That he is the plaintiff named above; that he has read the foregoing petition, knows the contents thereof, and verily believes that the same are true.

WM. WADE RICKETTS.

---

* Page numbering appearing at foot of page of original certified Transcript of Record.

Subscribed and sworn to before me this 20th day of February, 1945.

GEO. W. YOUNG,

Notary Public in and for the State of Washington, residing in Spokane.

[Endorsed]: Filed Feb. 21, 1945.

[Title of District Court and Cause]

ANSWER

Comes now the defendant, by Edward M. Connelly, United States Attorney for the Eastern District of Washington, and answering the petition for Declaratory Judgment of plaintiff herein, admits, denies and alleges as follows:

I.

Answering Paragraph I, defendant denies that petitioner is a resident of the City of Spokane, County of Spokane, State of Washington, or a resident of the Eastern Judicial District of Washington, as the term "resident" is defined in Title 8, Section 903, United States Code Annotated. [2]

II.

Answering Paragraph II of said petition, defendant denies that the action set forth in plaintiff's petition is brought pursuant to Section 502 of the Nationality Act of 1940, but admits that petitioner's

proceedings may have been brought under Title 8, United States Annotated Code, Section 903.

III.

Answering Paragraph III, defendant alleges that he has no information or knowledge upon which to base a belief concerning the allegations of said Paragraph III, and therefore denies same, save and except that Oklahoma is one of the States of the United States, which defendant admits.

IV.

Answering Paragraph IV, defendant alleges that he has no information or knowledge upon which to base any belief concerning the place of birth of Siegel Ricketts, father of the plaintiff, or Emma Shepard, mother of the plaintiff, and therefore denies the allegations with reference to the place of birth of each of said persons.

Further answering Paragraph IV, defendant denies that petitioner has been a citizen of the United States ever since his birth, and denies that he is now a citizen of the United States, and further denies that petitioner is a resident of Spokane County, State of Washington, as the term "resident" is defined in Title 8, Section 903, United States Code annotated.

V.

Answering Paragraph V, defendant denies that he erroneously contends and asserts that petitioner is an alien subject to deportation, and affirmatively

alleges the fact to be that said petitioner is an alien subject to deportation.

For a separate and affirmative defense to said plaintiff's petition, defendant alleges as follows:

I.

That Siegel E. Ricketts, father of the petitioner, was naturalized in the Dominion of Canada, on December 31, 1914, and that plaintiff was a minor child residing in Canada with his father at that time.

II.

That by virtue of the naturalization of his said father in Canada on [3] December 31, 1914, the said plaintiff became a citizen of the Dominion of Canada on December 31, 1914.

III.

That plaintiff, after he had attained the age of 21 years, and while residing in the Dominion of Canada, exercised his right and privilege as a citizen of Canada by voting in the General Provincial Election in the Province of Alberta, Canada, in 1927.

IV.

That during the time he resided in the Dominion of Canada, the plaintiff held the elective offices of school trustee and Counsellor of the Municipality at Round Hill, Saskatchewan, Canada, from in or about 1918 to in or about 1922, and that such public office required Canadian citizenship as one of its qualifications.

V.

Defendant alleges that plaintiff, if he was born in the United States as claimed by him, became a dual national of the United States and Canada on the date of his father's Canadian naturalization, to-wit: December 31, 1941; that he attained his majority some time in 1922 or in 1923; that thereafter he lost his United States citizenship by electing to retain Canadian nationality; that the plaintiff made no attempt, for a period of 13 or 14 years after attaining his majority, and while he was a resident and citizen of Canada, to return to the United States for permanent residence, until October 26, 1937, and that he otherwise made no effort to claim, maintain or reestablish his citizenship as a United States national from the date of his majority until the institution of his present action, but that he did affirmatively elect to abandon such United States citizenship at the time of attaining his majority in Canada in 1922 or 1923 and continuously thereafter for a period of 14 years.

For a second affirmative defense to said plaintiff's petition, defendant alleges as follows:

I.

That plaintiff's petition fails to state any right or privilege as a national of the United States, which right or privilege has been denied by the defendant.

Wherefore, defendant prays:

1. That petitioner take nothing by his action.

2. That the Court enter judgment dismissing plaintiff's petition and in favor of defendant.

3. For his costs and disbursements expended herein and for such further relief as the Court may deem proper in the premises.

EDWARD M. CONNELLY,
United States Attorney for the Eastern District of Washington, Attorney for Defendant.

Service of the within answer by receipt of copy thereof is acknowledged this 5 day of March, 1945.

GEO. W. YOUNG,
Attorney for Petitioner.

[Endorsed]: Filed Mar. 5, 1945. [5]

In the District Court of the United States for the Eastern District of Washington, Northern Division

No. 460

WILLIAM WADE RICKETTS,

Plaintiff,

vs.

THE ATTORNEY GENERAL OF THE UNITED STATES,

Defendant.

Spokane, Washington, September 30, 1946

Before: Hon. Sam M. Driver,
United States District Judge.

Appearances:

George W. Young of Spokane, Washington, for the Plaintiff.

Harvey Erickson, United States Attorney for the Eastern District of Washington, of Spokane, Washington, for the defendant. [6]

RECORD OF PROCEEDINGS AT THE TRIAL

Be It Remembered, that on the 30th day of September, 1946, the above-entitled cause came regularly on for trial in the above court at Spokane, Washington, before the Honorable Sam M. Driver, Judge of said court, sitting without a jury; the plaintiff appearing by George W. Young, of Spokane, Washington; the defendant appearing by Harvey Erickson, United States Attorney for the East-

ern District of Washington, of Spokane, Washington;

Whereupon, the following proceedings were had and done, to-wit:

(Mr. Young made an opening statement to the Court on behalf of the plaintiff.) [10]

WILLIAM WADE RICKETTS

the plaintiff, called as a witness in his own behalf, being first duly sworn, testified as follows:

Direct Examination

By Mr. Young:

Q. Your name is William Wade Ricketts?

A. Yes.

Q. And you're the petitioner in this case?

A. Yes.

Q. Against the Attorney General of the United States. Where were you born, Mr. Ricketts?

A. I was born in the village of Hydro, Oklahoma.

Q. Hydro, Oklahoma? A. Yes.

Q. I wish you would speak loudly and distinctly. What was your father's name?

A. Siegel Ricketts.

Q. And do you know where he was born, or where he was reputed to have been born?

A. Well, not exactly; in the State of Iowa, I believe.

Q. And where was your mothern born?

A. State of Illinois.

(Testimony of William Wade Ricketts.)

Q. Now, did you go to Canada with your father and mother? A. Yes.

Q. When, as near as you can remember, did you go to Canada?

A. About the month of July of 1910, the year 1910. [11]

Q. Was that during the time when certain lands were open to homesteading? A. Yes.

Q. How long did you remain in Canada?

A. I remained in Canada until about the year 1925.

Q. The year 1925; about how old were you?

A. I would be approximately twenty-three years old.

Q. And did you come back to the United States?

A. Yes.

Q. At that time. Where did you live; where did you come to? A. In the United States?

Q. Yes. A. To the town of Spokane.

Q. To the town of Spokane? A. Yes.

Q. Where did you live?

A. I lived in the Ensley Apartments on Pacific Avenue, Spokane.

Q. How long did you live there?

A. Approximately six months.

Q. Then did you return to Canada?

A. Yes.

Q. When, approximately, did you return to Canada? A. In the month of April.

Q. How's that? [12]

(Testimony of William Wade Ricketts.)

A. In the month of April, the year 1926, I think it was.

Q. That's as near as you can recall?

A. Yes.

The Court: He testified, I believe, that he came down to this country in 1925. Was the month given?

Q. Will you give the month of the year when you first came down?

A. It was in the fall months, October, November; I don't remember the exact date.

Q. Now, how long did you remain in Canada?

A. I remained in Canada until the following fall.

Q. Then what did you do?

A. Returned again to the United States.

Q. Where did you locate?

A. Well, I made my residence in the International Hotel, Spokane, and I worked out of Spokane here.

Q. Now, what year would that be, the second time you came back to the United States, after having gone there with your parents?

A. That would be getting into the year 1927, I believe.

Q. 1927; you lived in the International Hotel?

A. Yes.

Q. What did you do by way of employment?

A. I made that my headquarters, worked in the lumber woods outside of Spokane. [13]

Q. Where, exactly?

A. The one I worked the longest at was situated at Marcus, Washington.

(Testimony of William Wade Ricketts.)

Q. How long did you work there?

A. Approximately four or five months.

Q. Did you again return to Canada?

A. Yes.

Q. When did you again return to Canada?

A. I returned to Canada in the year 1927; I don't remember the exact date.

Q. What year? A. In the year of 1927.

Q. Was it in the spring, or the fall?

A. It was in the spring.

Q. And when was the next time you returned to the United States?

A. In September of 1936.

The Court: There seems to be some error here. If I get his testimony correctly, he said he stayed in Canada until the fall of 1927.

A. No, your Honor; I'm not quite clear of the exact dates. There was a period of two years I made the two trips.

The Court: According to my notes of your testimony, you stayed in Canada until the fall of 1927, and then you returned there in the spring of 1927.

A. I returned here in the fall of 1926; returned to Canada in the spring of 1927.

Q. You didn't keep a diary of these events?

A. No records.

Q. You're relying upon your memory at this time?

A. Yes; that's a good many years ago.

Q. Now, when was the next time, in the order of

(Testimony of William Wade Ricketts.)

sequence, that you returned to the United States, approximately?

A. In the month of September, 1936.

Q. Where did you locate?

A. I located at Twisp, Washington.

Q. In what county?

A. Okanogan County.

Q. That's in Washington?

A. In Washington State.

Q. What business did you engage in?

A. I engaged in the restaurant business.

Q. How long did you operate a restaurant in Twisp?

A. I operated a restaurant in Twisp until the summer of 1938.

Q. Now, you returned at what time, approximately?

A. I returned to the United States in September, 1936.

Q. 1936?

A. I returned to Canada in June of 1938.

Q. Now, what occasioned your return to Canada at that time? [15]

A. Well, the Immigration Service had started deportation proceedings against me.

Q. Well, were you taken into custody?

A. Yes.

Q. And were you confined somewhere?

A. Yes, I was confined in the county jail in Spokane ten days.

Q. Did you have counsel at that time?

(Testimony of William Wade Ricketts.)

A. No, I did not.

Q. Following your confinement, were you deported? A. Yes.

Q. At least, you were ordered out of the country?

A. Yes, I was ordered out of the country.

Q. During the time you were living in Twisp you say you engaged in the restaurant business?

A. Yes.

Q. What, if any, interest did you take in civic affairs?

A. Well, I took interest in all civic affairs, running of the village, small village.

Q. What did you do by way of citizenship burdens?

A. Well, I voted for the town council, the mayor of the town. I didn't hold any office, or that sort of thing, but I was always interested in any affairs that might pertain to the affairs of the community.

Q. What about the community welfare? [16]

A. I subscribed to that, and was an active member of the committee.

Q. What, if anything, did you do about joining fraternal organizations peculiar to the United States?

A. I didn't do anything of that kind.

Q. After your deportation in 1938, where did you go; that is, what part of Canada did you go to?

A. I went to Calgary, Alberta.

Q. How long did you remain there?

A. I remained there a trifle over one year.

(Testimony of William Wade Ricketts.)

Q. When did you return to the United States, if you did?

A. I returned to the United States in the month of December, 1939.

Q. Where did you go?

A. I returned to Spokane.

Q. What business or occupation did you pursue?

A. I worked in the lumber woods for a period of six or eight months, and then I engaged in the restaurant business.

Q. How long a period of time did you live here following that return, the last one that you've mentioned?

A. I have lived continuously ever since.

Q. What's that?

A. I have lived continuously ever since.

Q. You have lived here continuously since 1939?

A. In and around the city of Spokane.

Q. What business have you engaged in?

A. I have engaged in the restaurant business, principally.

Q. Where was your restaurant located?

A. 110 North Division Street, Spokane?

Q. Were you again apprehended by the immigration authorities? A. Yes.

Q. When did that occur?

A. That was the first week in January of 1943, I believe.

Q. Did you, at their suggestion, make a short trip into Canada for the purpose of securing some credentials? A. Yes, I did.

(Testimony of William Wade Ricketts.)

Q. Suggested by them? A. Yes.

Q. By the way, when did you employ me as counsel in this case?

A. Approximately two years ago.

Q. And during that time that you were up in Canada—when was it that you went to Canada for a short time?

A. I went to Canada in June—in May, two years ago, that would be 1944.

Q. Were you able to secure these credentials that was thought would facilitate your re-entry into the United States? [18]

A. No, I was unable.

Q. Did you come back? A. Yes.

Q. And you have been here ever since?

A. Ever since.

Q. Now, what, since you have been living in Spokane since 1939, have you been doing by way of assuming your citizenship duties?

A. I have assumed all the privileges of a citizen, exercised my rights as a citizen, I have assumed all the responsibilities of a citizen.

Q. Specifically, how did you assume those responsibilities, or exercise those rights?

A. Voting in elections.

Q. Are you a registered voter in Spokane?

A. Yes, sir.

Q. And you have been here, then, continuously since that time?

A. Continuously since that time.

(Testimony of William Wade Ricketts.)

Q. During the times you were in Canada what, if any, citizenship did you claim? A. None.

Q. Well, did you claim to be a citizen of any particular country, when you were in Canada?

A. I always claimed to be a citizen of the United States. [19]

Q. You professed to be a citizen of the United States during the times you were in Canada?

A. At all times.

Q. And you claim to be a citizen now?

A. Yes.

Mr. Young: You may inquire.

Cross-Examination

By Mr. Erickson:

Q. Mr. Ricketts, your father was naturalized in Canada as a Canadian or British subject, was he not? A. I believe so.

Q. Your mother became a British subject, too, in Canada, did she not? A. Yes.

Q. Do you remember the dates of naturalization of your father and mother as British subjects?

A. I believe it was in the month of December, 1915.

Q. And they lived in Saskatchewan at that time?

A. Yes.

Q. Now, when you entered the United States, when was it, in 1925, you say, the first time, in October or November?

A. Yes, as near as I remember it.

Q. And how old were you at that time?

(Testimony of William Wade Ricketts.)

A. I would be approximately twenty-three years old.

Q. Let's see, you were born in February, 1902?

A. That's right. [20]

Q. So at that time, then, you would be about twenty-three years and eight or nine months of age when you first entered the United States?

A. I imagine so, yes.

Q. And did you—or, how did you cross the line at that time? What information did you give them when you came into the United States?

A. I came in and reported at Eastport, Idaho.

Q. You reported at Eastport?

A. Yes, and they let me come as an American coming home.

The Court: I can't hear you, Mr. Ricketts.

A. They let me cross the line in 1925 as an American returning back to the United States, the country of my citizenship.

Q. When was the first time that you received a hearing, a warrant hearing, or hearing before the Immigration officials?

A. It was in the first week in March of 1938.

Q. That was the first time that you had a hearing before the Immigration officials? A. Yes.

Q. For the purpose of refreshing your memory, I will ask you if you did not have a hearing before a board of special inquiry at Vancouver, B. C., on October 26, 1937? A. Yes, that's true. [21]

Q. And that was before the Canadian Board up there at that time? A. Yes.

(Testimony of William Wade Ricketts.)

Q. Before an American Board? A. Yes.

Q. Before Mr. Alpheus M. Illman, Chairman, Earl F. Brakke, and Carl E. Johnston?

A. I do not know their names.

Q. Did you state at that time anything as to your nationality? A. Yes.

Q. What did you tell them?

A. I told them I was an American.

Q. You were asked as to your citizenship at the time of that hearing, were you not?

A. Yes, I believe so.

Q. And you stated that you were an American citizen? A. Yes.

Q. When is the next time that you had a hearing before the Immigration Service?

A. In March of 1938.

Q. And where was that?

A. Right here in the town of Spokane, before Inspector Stewart.

Q. In the immigration offices here in Spokane?

A. Yes, I believe they were in the Radio Central Building in [22] Spokane.

The Court: I wish you would keep your voice up, Mr. Ricketts. You have a rapid form of speech. I can't hear from where I'm sitting.

Q. I will ask you if you did not have a hearing before Frank S. Nooney, this man right here, Immigrant Inspector and Examining Officer——

A. He's the gentleman that arrested me and brought me to town.

(Testimony of William Wade Ricketts.)

Q. Wait until I finish the question, please; at Twisp, Washington, on March 1, 1938?

A. No, I didn't have any hearing.

Q. Well, were you asked questions, and answers written to the questions that were asked you at that time? A. No, sir.

Q. What was the nature of the proceedings that you had before Mr. Nooney?

A. Mr. Nooney came to my place of business with a warrant and arrested me, brought me to Spokane.

Q. I will ask whether or not Mr. Nooney made the following statement to you: "You are advised that I am a United States Immigrant Inspector, and authorized by law to administer oaths in connection with the enforcement of the Immigration Law. I desire to take a statement regarding your right to be and remain in the United States. [23]

Any statement you make should be voluntary, and you are hereby warned that such a statement may be used against you either in a criminal or deportation proceeding. Are you willing to make a statement or answer questions under these conditions?" and you answered "Yes." Do you remember that?

A. I do not.

Q. Well, do you remember later on that day of March 1, 1938, that you were given a hearing conducted by S. H. Stewart, Immigrant Inspector?

A. I do.

Q. In Spokane, Washington; I believe that was March 3, 1938. A. Approximately that date.

(Testimony of William Wade Ricketts.)

Q. You were placed under oath at that hearing? A. Yes.

Q. Were you asked as to your citizenship at that hearing?

A. I don't remember; I do not think I was.

Q. Do you recall the following question being asked you at that hearing: "Of what country are you now a citizen?" Do you recall that question being asked you? A. No, I do not.

Q. It might have been asked?

A. It is possible; I do not remember it.

Q. Do you remember giving an answer that you were a Canadian, at that time? [24]

A. No, I do not.

Q. Do you remember being arrested the second time by Guy H. Walter? A. Yes.

Q. And where was that arrest, Mr. Ricketts?

A. I wasn't exactly arrested. I was requested to come down and appear at the Immigation Service in the Welch Building. I was not arrested.

Q. Did you have a hearing at that time?

A. Yes.

Q. And I will ask you if that was on or about April 1, 1942?

A. That's approximately the date, yes.

Q. And I'll ask you whether or not Mr. Walter didn't tell you that he was an immigrant inspector, and that you did not have to make any statement, and that if you did make a statement it may be used against you later? A. He did.

(Testimony of William Wade Ricketts.)

Q. I'll ask you at that time whether Mr. Walter asked you if you voted in Canada? A. Yes.

Q. And did you answer that you did vote in Canada? A. Yes.

Q. And did you give him the year that you voted in Canada as 1928? A. No. [25]

Q. What year did you give him?

A. I couldn't remember the exact year; I believe I told him 1927.

Q. Do you remember Mr. Walter asking you then how long you intended to remain in the States?

A. Yes.

Q. And do you remember telling him that is a very indefinite question, I only remained a couple of months; or he asked you how long you then intended to remain in the United States, in 1926, and you said that you only remained a couple of months, and then returned to Canada; do you remember that? A. No, I do not.

Q. Do you remember of having a hearing on August 2, 1943, at Spokane, Washington, before James E. Sullivan, an examining inspector for the Immigration Department? A. I do.

Q. Do you remember being asked the question "Of what country are you now a citizen or subject?" and answering "Canada"?

A. I do not.

Q. I beg pardon? A. I do not.

Q. Do you remember being asked the question "Is it on the basis of that naturalization that you

(Testimony of William Wade Ricketts.)

claim to be a [26] citizen of Canada?" and answering "Yes"? A. No, I do not.

Q. Do you remember being asked the question "Did you in Canada have all the rights and privileges of a Canadian citizen"? and answering "Yes"? A. Yes.

Q. Do you remember being asked the question "Did you hold public office in Canada"? and answering "Yes"? A. Yes.

Q. Being asked the question "What office did you hold"? and you answering "School trustee and councilor of the municipality; that's the same as county commissioner here." Do you remember answering that? A. Yes.

Q. And then being asked the question "In what municipality was that"? and answering "Roundhill, Saskatchewan"? A. No, I do not.

Q. Do you remember being asked whether or not that was an elective post, and answering "Yes"? A. Yes.

Q. Do you remember being asked "Did you have to be a citizen of Canada to hold that position"? and answering "Yes"? A. No, I don't.

Q. Do you remember being asked the question "Did you at that time always consider yourself to be a citizen of Canada?" [27] and answering "Yes"? A. No.

Q. Do you remember being asked the question as follows: "Upon attaining your majority, though, it appears that you elected to retain the citizenship acquired by you through the naturalization of your

(Testimony of William Wade Ricketts.)

father in Canada, does it not?" and answering "Yes"?

A. The question isn't quite clear, sir.

Q. Well, I'll repeat it. You were asked the following question: "Upon attaining your majority, though, it appears that you elected to retain the citizenship acquired by you through the naturalization—"; that question isn't clear. I'll have to go back and read that in connection with another one. Question: "It was in 1923 that you became twenty-one years of age?" Do you remember answering "Yes" to that question? A. Yes.

Q. Then did you at that time consider yourself to be a citizen of Canada? A. No.

Q. Do you remember answering "Yes" to that?

A. I do not.

Q. And question: "Did you have any intention at that time of returning to the United States to reside?" and answering "No"? [28]

A. No, I do not.

Q. Question: "Did you consider yourself to be a citizen of the United States at that time?" and answering "I believe according to the Acts at that time I was. It was at one time explained to me by an immigration officer that after residing in the United States for a period of sixty days or so, I became an American citizen again." Do you remember answering that question? A. Yes.

Q. Do you remember being asked the question "How many times have you voted in Canada?" and answering "I have only voted once in the gen-

(Testimony of William Wade Ricketts.)

eral elections. The municipal and school, voting in those you have to have the same qualifications that you do in a primary or general election, but you don't prescribe to any party." Do you remember answering that question?

A. I remember telling the immigration service I voted once, but I didn't state the general election.

Q. You don't remember telling them that you did vote in any general election?

A. No, I do not.

Q. Do you remember being asked this question: "You intended when you became of age to remain in Canada indefinitely, and assume the rights and privileges of a Canadian citizen?" and answering "Yes" to that question? [29] A. I do not.

Q. Mr. Ricketts, did you make any statement to any other governmental agency in the United States that you were a Canadian citizen?

A. Not to my knowledge.

(Whereupon, Selective Service Questionnaire was marked Defendant's Exhibit No. 1 for identification.)

Cross-Examination
(Continued)

Q. I will hand you defendant's identification 1, a Selective Service Questionnaire dated May 8, 1942, and ask you if that is your signature that appears on there? A. That's my signature.

Q. William Wade Ricketts? A. Yes.

Q. I will ask you if in filling out the applica-

(Testimony of William Wade Ricketts.)

tion, Selective Service Form No. 40, in Section 9, if you did not state that you were a citizen of Canada?

A. I don't remember doing so.

Q. Is that your handwriting that appears on that form? A. It appears to be, yes.

Q. And it states, a citizen or subject of Canada, does it not? A. That's what it says there.

Q. And you put that down there, did you not, at the time?

A. No, I do not believe I did. A gentleman by the name of [30] Mr. Scott wrote that.

Q. Well, this form is acknowledged before a notary public, is it not?

A. Yes, that's my signature, it's quite true.

Q. You read it over before you signed it?

A. I should have.

Q. Well, did you?

A. I apparently did not.

Mr. Erickson: I will offer it in evidence.

The Court: It will be admitted.

(Whereupon, Defendant's Exhibit No. 1 for identification was admitted in evidence.)

DEFENDANT'S EXHIBIT No. "1"

Selective Service Questionnaire

(Stamp of Local Board)

Order No. 10559 Date of mail May 4, 1942

Local Board No. 4, Spokane City, State Armory, Spokane, Washington. May 4, 1942. 97 663 004

(Testimony of William Wade Ricketts.)

Defendant's Exhibit No. 1—(Continued)

Name: William Wade Ricketts, 110 N. Division, Spokane, Spokane County, Washington.

Notice to Registrant

You are required by the Selective Service Regulations to fill out this Questionnaire truthfully and to return it to this local board on or before the date shown below. Willful failure to do so is punishable by fine and imprisonment.

This Questionnaire must be returned on or before May 14, 1942.

LOUIS WASMER,
Member of Local Board.
By W. D. PFEIFER,
Clerk.

Statements of the Registrant

Series I.—Identification

1. My name is William Wade Ricketts.
2. In addition to the name given above, I have also been known by the name or names of, None.
3. My residence now is N. 110 Division St., Spokane, Spokane County, Washington.
4. My telephone number now is M. 3179.
5. My Social Security number is 539-07-1107.
6. I was 40 years of age on my last birthday.

Series II.—Physical Condition (Confidential)

1. To the best of my knowledge, I have 1 physical or mental defect or disease. If so, they are, double groin hernia and wear truss.
2. I am not an inmate of an institution.

(Testimony of William Wade Ricketts.)

Defendant's Exhibit No. 1—(Continued)

Series III.—Education

1. I have completed 8 years of elementary school and none years of high school.

2. I have had the following schooling other than elementary and high school (if none, write "None"): None.

3. I can read and write the English language.

Series IV.—Present Occupation or Activity

1. I am now working at the job described under No. 2 below.

2. (a) The job I am now working at is cafe operator and dinner cook.

(b) I do the following kind of work in my present job: dinner cook and cafe operator.

(c) I have had 8 years experience in this kind of work.

(d) My average monthly earnings in my present job are $100.00.

(e) In my present job, I am—

[ ] a regular or permanent employee, working for salary, wages, commission, or other compensation; I have worked 8 years in my present job, and expect to continue indefinitely in it.

[x] an independent worker, working on my own account, not hired by anyone, and not hiring any help.

[x] an employer or proprietor hiring 3 paid workers.

(f) I am not now employed in national defense work.

(Testimony of William Wade Ricketts.)

Defendant's Exhibit No. 1—(Continued)

(g) My employer is: Empire Cafe, myself, N. 110 Division St., Spokane, whose business is Eating House.

(h) Other business or work in which I am now engaged is None.

Series VI.—Occupational Experience, Qualifications, and Preferences

1. I have also worked at the following occupations other than my present job, during the past 5 years: (If none, write "None.")

Occupation—Cafe cook and manager.

Kind of Work Done—I prepare the meals, do the buying, keep the books and general management.

Years Worked: From 1934 to 1942.

2. My usual occupation, or the occupation for which I am best fitted, is cafe operator.

3. I am not licensed in a trade or profession.

4. I have worked in the following State or States during the past 2 years: Washington and Idaho.

5. I prefer the following kind of work: operating grain farm.

I would not consider accepting a job which would require me to move away from my present home.

Series VII.—Family Status and Dependents (Confidential except as to names and addresses of claimed dependents)

1. I am divorced; I do not live with my wife;

(Testimony of William Wade Ricketts.)

Defendant's Exhibit No. 1—(Continued)

if not, her address is S. 12½ Howard St., Spokane; we were married at Coeur d'Alene on October 31st, 1940.

2. (a) I have none children under 18 years of age.

3. (a) The following is a list of all members of the family group in which I live (list yourself first):

Name—Wm. Wade Ricketts.

Sex—Male.

Age last birthday—40.

Relation to Me—Self.

Amount this person earned by work during past 12 months—$1200.00.

(b) I contributed $300.00 during the last 12 months to the support of the above-listed family group.

7. I do rent the house or apartment in which I live; if so, the monthly rent now is $.....

9. Other facts which I consider necessary to present fairly my own status and that of my dependents as a basis for my proper classification are (if none, write "None"): Nothing to say.

Series IX.—Citizenship

1. I was born at Hydro, Okla., U.S.A.
2. I was born on Feb. 3, 1902.
3. My race is White; Scotch Irish.

(Testimony of William Wade Ricketts.)

Defendant's Exhibit No. 1—(Continued)

4. I am not a citizen of the United States.

5. I was last a citizen or subject of Canada. My Alien Registration No. is None.

6. My permanent residence has been in the United States since Dec. 6, 1939.

7. I have not filed a declaration of intention to become a citizen of the United States (first papers).

Series XI.—Court Record (Confidential)

1. I have been convicted of a crime, other than minor traffic violations.

2. The record of my convictions is as follows:

Offense—Illegal entry.
Date—June 6th, 1938.
Court—U. S. Federal Court, Spokane, Wn.
Sentence—10 days in county jail.

3. I am not now being retained in the custody of a court of criminal jurisdiction, or other civil authority.

Registrant's Affidavit

State of Washington,
County of Spokane—ss.

I, William Wade Ricketts, do solemnly swear (or affirm) that I am the registrant named and described in the foregoing statements in this Questionnaire; that I have read (or have had read to me) the statements made by and about me, and that each and every such statement is true and complete to the best of my knowledge, information, and belief.

(Testimony of William Wade Ricketts.)

Defendant's Exhibit No. 1—(Continued)

The statements made by me in the foregoing are in my own handwriting.

/s/ WILLIAM WADE RICKETTS.

Subscribed and sworn to before me this 7th day of May, 1942.

[Seal] /s/ GEO. H. DODD,
Notary Public.

Minute of Action by Local Board No. 4, Spokane City, State Armory, Spokane, Washington, May 12, 1942. 97 663 004

The local board classifies the registrant in Class 1, Subdivision ....., by the following vote: Yes 2, No .....

/s/ R. J. RAYMOND,
Member.

Minutes of Other Actions

6/16/42—MSP Reg. class IA per auth 625.51 (e) Form 57 sent reg. Geo. G. Gunn.

10/31/42—Form 150 mailed to appear 11/11/42.

11/4/42—Ind. pp telegram St. Hdqs. 11/4/42

11/17/42—Form 150 mailed to report 12/16/42.

Dec. 16/42—MSP IV-H. Geo. G. Gunn.

8/30/43—Regis. class I-A(H)—57 sent. Geo. G. Gunn.

2/14/45—Class IV-A 57 reg. Geo. G. Gunn.

(Testimony of William Wade Ricketts.)

Mr. Erickson: I will ask permission for the clerk to substitute a copy for Defendant's 1 later on, because it is part of the permanent Selective Service file.

The Court: I think that may be done. The signature has been admitted.

Mr. Young: I have no objection to a substitution.

The Court: You may substitute a copy.

(Whereupon, Immigration and Naturalization Service Form No. 1-55 was marked Defendant's Exhibit No. 2 for identification.)

Cross-Examination
(Continued)

Q. I will ask you, Mr. Ricketts, whether or not in August, 1943, on August 2, 1943, you filled out Form No. 1-55 [31] with the Department of Justice, Immigration and Naturalization Service, the form therein, and acknowledged its truth and swore to its veracity before James E. Sullivan, in this room, an immigrant inspector? A. I did.

Q. Is that your handwriting that appears thereon? A. That's my signature, sir.

Mr. Young: I would like to reserve, if this is what I think it is, I would like to reserve or inquire into the circumstances under which this was signed. I don't deny the execution of the document, and the manner and form, but the circumstances under which it was executed.

The Court: Would that affect its admissibility,

(Testimony of William Wade Ricketts.)

Mr. Young, or just the construction to be placed upon it?

Mr. Young: I have an idea, your Honor, that it would merely affect the construction to be placed upon it, and the circumstances under which it was executed would be taken into consideration by the court.

The Court: I will admit it in evidence; then you can go into the circumstances on redirect.

(Whereupon, Defendant's Exhibit No. 2 for identification was admitted in evidence.)

[Defendant's Exhibit No. 2 set out on pages 242 to 263.]

Cross-Examination
(Continued)

Q. In this form, Mr. Ricketts, did you state in there—— [32]

The Court: What is the date of this, Mr. Erickson?

Mr. Erickson: This is sworn and acknowledged on August 2, 1943.

Q. Did you state in that form there that you are a citizen or subject of Canada, a British subject, in quotation marks?

A. I stated that the immigration service assumed that. That was really questions——

Q. Well, I move the answer be stricken and the witness directed to answer the question. Did you state that you were a——

A. Not to my knowledge.

(Testimony of William Wade Ricketts.)

Q. This has been admitted. Well, that last form that was executed on August 2, 1943, was filled out on your part voluntarily, was it not?

A. I did not fill it out at all, to my knowledge.

Q. Oh, you didn't fill it out at all? A. No.

Q. You signed it, though? A. I signed it.

Q. You did not read it before you signed it?

A. I apparently did not.

Q. Well, now, Mr. Ricketts, you were in jail at that time, were you not? [33] A. I was not.

Q. Or were you under arrest?

A. I was under arrest.

Q. And you made application to go back to Canada voluntarily, did you not? A. Yes.

Q. And you did not have to make that application?

Mr. Young: I object to that, as to what he had to do or did not have to do. He can state the facts.

Mr. Erickson: This man is just making a request for affirmative action——

The Court: Well, that's rather a broad question. I think it calls for a conclusion. I think it should be stated more specifically.

Cross-Examination
(Continued)

Q. Were you directed by anybody to make out that form? A. Yes.

Q. Who directed you?

A. Inspector Walter.

(Testimony of William Wade Ricketts.)

Q. What did he tell you about making out that form?

A. I don't remember that he specified——

Q. Did he tell you you could make it out or could not make it out, or did he tell you you must make it out?

A. He gave me the impression I must.

Mr. Erickson: I move the answer be stricken.

The Court: You can bring that out. I'll let the answer stand.

Cross-Examination
(Continued)

Q. What did Walter tell you about the form?

A. As I remember it, he told me it was merely an application to—he gave me the information that if I would fill out this form I wouldn't be prosecuted for illegally entering the United States.

Q. Instead of prosecuted you mean deported, don't you?

A. No, I mean prosecuted, before being deported.

Q. Had you ever been deported before?

A. Yes.

Q. When? A. In 1938.

Q. Now, you state that you registered as a voter in Twisp, Washington?

A. No, I was never registered as a voter, to my knowledge.

Q. You say you voted for a town councilman in Twisp? A. Yes.

(Testimony of William Wade Ricketts.)

Q. You don't have to be a registered voter, then, to vote for a town council?

A. Well, apparently not; my vote wasn't questioned.

Q. Now, this last time, you said that you came to Spokane in 1939, in September?

A. Yes. [35]

Q. And did you register at that time?

A. Not at that time, no.

Q. When did you register as a voter?

A. Oh, I don't remember; three or four years ago.

Q. Three or four years ago?

A. Yes; I don't remember.

Q. That would be 1942 or 1943?

A. Yes, approximately that date.

Q. Did you vote in the election in 1942?

A. No, not in the general election.

Q. What general elections did you vote in?

A. I voted in the present election, the primaries of this year.

Q. That's since this action was instituted?

A. Yes.

Q. You did not vote before you filed this action for declaratory judgment for citizenship?

A. I don't remember whether I did not not, prior to the date of the action.

Q. Well, you would remember the first date you voted in the United States?

A. Well, I stated the first time was at Twisp.

(Testimony of William Wade Ricketts.)

Q. I mean you would remember the first time you voted in a general election in the United States?

A. I believe I voted in the general election of 1938, in [36] Twisp.

Q. In the hearing in 1943 before Immigrant Inspector Sullivan, were you asked the following question: "Did you ever vote in the United States?" Do you remember being asked that question?

A. No, I do not.

(Whereupon, Immigration and Naturalization Form 548 was marked Defendant's Exhibit No. 3 for identification.)

Cross-Examination
(Continued)

Q. Mr. Ricketts, on or about, on September 6, 1936, at Oroville, do you remember making out and signing at that time Immigration and Naturalization Form 548, which is a manifest, a record of admission to the United States? Do you remember signing that? A. I do.

Q. And that is your signature that appears on there? A. Yes.

(Whereupon, Immigration and Naturalization Form 694 was marked Defendant's Exhibit No. 4 for identification.)

Cross-Examination
(Continued)

Q. I will hand you defendant's identification 4, which is a record of alien admitted as visitor, Form

(Testimony of William Wade Ricketts.)

694, and ask you if you signed that on September 6, 1936? [37] A. I did.

Mr. Young: I can't see the materiality of exhibit for identification 3.

Mr. Erickson: All right, I will pass it up to the court. The purpose is to show at that time he claimed to be a Canadian.

Mr. Young: I object to it. I didn't notice that on the form. If it is an admission against interest, why, of course it would be admissible. I didn't catch that.

The Court: On this nationality, it looks like an abbreviation of Canada. It will be admitted.

(Whereupon, Defendant's Exhibit No. 3 for identification was admitted in evidence.)

113074 (DEFENDANT'S EXHIBIT NO "3")

MANIFEST Port of Oroville, Wash Date Sep 6 1936 Serial No. See-158-78

Family name	Given name	Accompanied by
RICKETTS	Wade W.	

Deported Refused Perm. to Reapply

C.I.V. No.	Place and date of issue	Section and subdivision	Quota country charged	R.P. No.
		Act of 1924;		P.V. No.

Place of birth (town, country, etc.)	Age Yrs.	Mos.	Sex	S.	Occupation	Read	Write
Hydro, Ok. June 2, 1937	34		M	[illegible]	Farmer	Yes	

Language or exemption	Race	Nationality	Last permanent residence (town, country, etc.)
		Cand.	Kamloops, B. C.

Name and address of nearest relative or friend in country whence alien came
Sister, Grace Ricketts

Ever in U.S. From To Where Passage paid by
Yes birth 1910 1925-1927 Self

Destination, and name and complete address of relative or friend to join there
Friend Richard Horne Twisp, Wash

Money shown	Ever arrested and deported, or excluded from admission	Purpose in coming and time remaining
50.00	No	~~visit - 2 weeks~~

Head tax status	Height	Complexion	Hair	Eyes	Distinguishing marks
	5 Ft. 8½ In.	Med	Bro	Gray	Extended to June 1,1937

Seaport and date of landing, and name of steamship

Con. Im. Identification card No.

Records by	Previously examined at	Date	Previous disposition	Present disposition, P.I.	Arrived by
LJB					Stage

U.S. DEPARTMENT OF LABOR, Immigration and Naturalization Service. Form 548.
See File 1321/125 & 158-78
14—2160

DEFENDANT'S EXHIBIT "3"

(Testimony of William Wade Ricketts.)

Mr. Erickson: I will offer 4 too, which is a supplement to 3.

Mr. Young: Does this bear his signature somewhere?

Mr. Erickson: Yes, the signature is on the reverse. Is there any objection to 4, Mr. Young?

Mr. Young: No.

The Court: 4 will be admitted.

(Whereupon, Defendant's Exhibit No. 4 for identification was admitted in evidence.)

DEFENDANT'S EXHIBIT No. 4

Form 694

U. S. Department of Labor

Immigration and Naturalization Service

Record of Alien Admitted as Visitor

Port, Oroville, Wash. No. 113074

Date, Sept. 6, 1936.

Name, Wade W. Ricketts.

Date and place of birth, Hydro, Okla.

Nationaity, Cand. Race .....

Sex, M. Ht. 5-8¼. Comp., Med. Hair Bro. Eyes, Grey.

My children, under 16 years, accompanying me, are .....

Home address, Kamloops, B. C.

Nearest relative there, Sister, Grace.

Destined to, Richard Horne.

Address, Twisp, Wash.

Time for which admitted, 2 weeks.

Signature, Wm. W. Ricketts.

(Testimony of William Wade Ricketts.)

Admitted by L. J. Brunner, U. S. Immigrant Inspector.

Please have your departure from the United States verified by an officer of the United States Immigration and Naturalization Service, who will relieve you of further responsibility for disposing of this record. If that is impossible, please have departure verified by an officer of the United States Customs Service or the Canadian immigration or customs services, or by the conductor or purser or other person in charge if you travel by public conveyance, and then mail this record to the United States immigration office at the port where you entered the United States. This will save much correspondence.

(Stamp—"Received Aug. 1, 1937, Imm. & Nat. Service, Oroville, Wash.)

I departed from the United States at Oroville June 2nd, 1937, by auto. Date June 2nd, 1937.

Departure verified by L. J. Brunner.

[Stamped]: Extended 6 months to June 1, 1937. L. J. B.

[Form 694a, Memorandum Copy, is duplicate of Form 694, Record of Alien Admitted as Visitor, except 694a contains notation: "See file 1321/125. Out June 2, 1937. Lost Original.]

Cross-Examination
(Continued)

Q. So, on both Defendant's Exhibits 3 and 4, Mr. Ricketts, the manifest and the application, you

(Testimony of William Wade Ricketts.)

listed, you appear [38] on there as a Canadian citizen? A. Yes.

Q. And that was on when you signed it?

A. Yes.

(Whereupon, "Application to Extend Time of Temporary Stay" was marked Defendant's Exhibit No. 5 for identification.)

Cross-Examination
(Continued)

Q. I hand you defendant's identification 5, Mr. Ricketts, and ask you to state whether or not this form "Application to Extend Time of Temporary Stay" dated December 7, 1936, is in your handwriting? A. It is.

Q. And that's your signature?

A. That is.

Q. That appears on there, "William Wade Ricketts"?

Mr. Young: Is it in his handwriting?

Mr. Erickson: He says so.

Cross-Examination
(Continued)

Q. In regard to this question appearing on this form, in your own handwriting, "At present I owe allegiance to:" and "Canada" written in there in pencil, that's your handwriting? A. It is.

Mr. Erickson: I offer the form in evidence. [39]

The Court: It will be admitted.

(Whereupon, Defendant's Exhibit No. 5 for identification was admitted in evidence.)

(DEFENDANT'S EXHIBIT "5")

Form 639
U. S. DEPARTMENT OF LABOR
Immigration and Naturalization Service

APPLICATION TO EXTEND TIME OF TEMPORARY STAY

Note: This application will not be considered unless completely filled out and sworn to.

File No. _____

My name is William Wade Ricketts My age is 34 years.

My occupation is Farmer I am ~~married~~-single-~~divorced-widow-widower~~.
(Strike out inappropriate designations)

The name and present address of my {husband / wife} is _____
(Name) (Address)

The names, ages, and present addresses of my children are:

_____
(Name) (Age) (Address)

My place of birth is Hydro Okla. U.S.A
(City) (Province) (Country)

At present I owe allegiance to Canada
(Country)

My foreign residence is Kamloops, B. C. Canada
(Street) (City or town) (Province) (Country)

My residence in the United States is Twisp, Wash
(Street and number) (Town or City) (State)

I am in possession of passport No. - issued by _____
(Passport must be valid for at least 60 days beyond requested extension) (Country)

on (date) _____ at (place) _____
(Month) (Day) (Year) (Country) (City or town)

which will expire on _____. I came as a nonimmigrant,
(Month) (Day) (Year)

class_____ of Section 3, Immigration Act of 1924.

I arrived in the United States on the 6th day of Sept, 1936, at Oroville by
(Port of Entry)
B. C. Coach
(Name of vessel or railroad)

I have a return ticket No. -, issued by -, at -

I was admitted for a temporary period of Two weeks months.

I have secured _____ extension, the last extension to expire on _____
(Number) (Month)(Day)(Year)

The names and addresses of {relatives / friends} I am visiting are:

Mr Richard Horn Twisp, Wash
(Name) (Relative or Friend) (Address)

Mrs Agnes Miller Twisp, Wash
(Name) (Relative or Friend) (Address)

The circumstances requiring my presence in the United States are as follows:

I came here on the advise of my doctor who recommended a lower altitude for my health.

Financial condition of alien abroad Have income of about $1000 per year from property in B.C. & Sask.

I (am- / am-not) employed in the United States. (If employed, state nature of occupation and by whom employed. _____ (Name) (Address)

My employment began _____ (Month) (Day) (Year)

My monthly salary or wages are _____

I (am / am-not) engaged in business in the United States. (If engaged in business, state nature, character, and location of the business.) _____

My monthly income derived from such business is _____

(If not employed or engaged in business in the United States, describe fully the source and amount of your income.)

Have income of about $1000 per year derived from rental of farm at Kamloops and land in Sask.

I desire to secure an extension of 6 Months to my present period of admission (Time Desired)

and submit herewith in detail the reasons why I cannot depart at the time as originally fixed or as previously extended _____

WM. WADE RICKETTS
(Signature of Alien)

(THE ABOVE STATEMENTS MAY BE SWORN TO BEFORE ANY IMMIGRATION AND NATURALIZATION OFFICER WITHOUT COST)

STATE OF WASHINGTON :
: ss:
COUNTY OF OKANOGAN :

Subscribed and sworn to before me this the 7 day of December, 1936.

(SEAL)

L. J. BRUNNER
Immigrant Inspector, (Official title)

Note. - This form, properly executed by the alien must be forwarded to the immigration and naturalization officer in charge at the port of arrival in the United States, not less than 15 nor more than 30 days prior to date fixed for departure.

IMPORTANT - One application may be filed as to several members of a family group if all of them arrived at the same port on the same day and by the same means of conveyance, but as to any member of a family group who arrived at a different port, or on a different day, or a different manner, a separate application must be filed.

(LAST PAGE DEFENDANT'S EXHIBIT "5")

(Testimony of William Wade Ricketts.)

Mr. Young: Upon reflection, your Honor, I am wondering if the line "I owe allegiance," and that apparently is the purpose or gist of the exhibit, isn't anything but a conclusion?

The Court: Well, I think it may be taken as an admission. It can be explained, of course.

Mr. Young: For the purpose of the record only, I realize that it is not timely, I object to that particular exhibit on all the grounds.

The Court: It will be admitted, over objection.

(Whereupon, Manifest dated June 14, 1937, was marked Defendant's Exhibit No. 6 for identification.)

Cross-Examination
(Continued)

Q. I hand you defendant's identification 6, which is dated June 14, 1937, and is a manifest. I will ask you if that is your signature that appears thereon?

A. That appears to be my signature.

Mr. Erickson: I will offer defendant's identification 6.

The Court: It will be admitted. [40]

(Whereupon, Defendant's Exhibit No. 6 for identification was admitted in evidence.)

(DEFENDANT'S EXHIBIT NO. "6") (Watch For)

Deported 7/2/38

MANIFEST Port of LAURIER, WASH Date June 14 1938 Serial No. Spokane

Family name	Given name	Accompanied by
RICKETTS	WILLIAM	Agnes Miller U.S.Cit.

C.I.V. No.	Place and date of issue	Section and subdivision Act of 1924;	Quota country charged	R.P. No. P.V. No.

Place of birth (town, country, etc.)	Age Yrs.	Mos.	Sex	M. S. W. D.	Occupation	Read / Write
Hydro, Okla, U.S.A.	35		M		Farmer	Yes / Yes

Language or exemption	Race	Nationality	Last permanent residence (town, country, etc.)
Eng.	Scotch	Can.(tob.Case)	Kamloops, B. C.

Name and address of nearest relative or friend in country whence alien came

Sister: Grace Ricketts " "

Ever in U.S. From	To	Where	Passage paid by
2-3-02	1910	Oklahoma	Self

Destination, and name and complete address of relative or friend to join there

Brother: Wayne Ricketts, Newport, Wash. & Richard Horne, Twisp, Wash

Money shown	Ever arrested and deported, or excluded from admission	Purpose in coming and time remaining
$115.00	No	T/s - 2 months

Head tax status	Height	Complexion	Hair	Eyes	Distinguishing marks	Con. Im. Identification card No.
-	5 ft. 8½ in.	Fair	B	Blue	Horizontal forehead wrink	Yes

Seaport and date of landing, and name of steamship

Records by	Previously examined at	Date	Previous disposition	Present disposition, P. I.	Arrived by
GUP				Adm. T/s	Auto

U.S. DEPARTMENT OF LABOR, Immigration and Naturalization Service. Form 548. Wash. U 2727 14—2140

DEFENDANT'S EXHIBIT "O"

(Testimony of William Wade Ricketts.)

Cross-Examination

(Continued)

Q. You state upon there likewise that you are Canadian, do you not, Mr. Ricketts?

A. What is the reading on there?

Q. Nationality, Can, C-a-n.

A. That is not my writing, however.

Q. Was it on there when you signed it?

A. Yes, it was on there, apparently. Those forms, you find them at the line.

Mr. Young: I didn't hear you.

A. Those forms, they appear at any port of entry, and as a rule, they are made out by the official, and signed by the applicant without due consideration.

Mr. Erickson: I move that that last answer be stricken.

Mr. Young: I consent to that.

The Court: It will be stricken.

Mr. Young: I wish to caution you, Mr. Ricketts, do not make any statements unless a question is propounded to you by either counsel.

(Whereupon, Immigration and Naturalization Form 639, "Application to Extend Time for Temporary Stay" dated September 21, 1937, was marked [41] Defendant's Exhibit No. 7 for identification.)

Cross-Examination

(Continued)

Q. I hand you Immigration Form 639, which is an "Application to Extend Time for Temporary

(Testimony of William Wade Ricketts.)

Stay," and it is dated September 21, 1937, and ask you if that is your signature that appears on there?

A. That looks like my signature.

Q. Is that your signature? A. Yes.

Mr. Young: I am going to make the same objection to the statement "At present I owe allegiance to Canada" as I made before. My theory is that it is a mere conclusion.

The Court: Are you offering that?

Mr. Erickson: Yes.

The Court: It may be admitted.

(Whereupon, Defendant's Exhibit No. 7 for identification was admitted in evidence.)

(DEFENDANT'S EXHIBIT "7")

3

Form 639
U. S. DEPARTMENT OF LABOR
Immigration and Naturalization Service

(Stamp - "RECEIVED
Sep 22, 1937
Imm & Nat
Service
Laurier
Wash.)

APPLICATION TO EXTEND TIME OF TEMPORARY STAY

NOTE: This application will not be considered unless completely filled out and sworn to.

File No. _____

My name is William Ricketts My age is 35 years.
(First) (Middle) (Last)

My occupation is Cafe Manager I ~~am married~~ single ~~divorced widow widower~~.
(Strike out inappropriate designation)

The name and present address of my (husband / wife) is _____
(Name) (Address)

The names, ages, and present addresses of my children are:

_____
(Name) (Age) (Address)

My place of birth is Hydro Oklahoma U.S.A
(City or town) (State) (Country)

At present I owe allegiance to Canada
(Country)

My foreign residence is Kamloops B. C. Can.
(Street) (City or town) (Province) (Country)

My residence in the United States is _____ Twisp, Wn
(Street and number) (Town or city) (State)

I am in possession of passport No. - issued by - _____
(Passport must be valid for at least 60 days beyond requested extension)

on (date) - at (place) -
(Month) (Day) (Year) (Country) (City or town)

which will expire on _____. I came as a non-
(Month) (Day) (Year)

immigrant, class - of Section 3, Immigration Act of 1924.

I arrived in the United States on the 14th day of June, 1937, at Laurier by
(Port of entry)

Motor Car
(Name of vessel or railroad)

I have a return ticket No. - issued by - at -

I was admitted for a temporary period of 3 months.

I have secured - extensions, the last extension to expire on _____
(Number) (Month)

_____
(Day) (Year)

The names and addresses of (relatives / friends) I am visiting are:

Wayne Ricketts — (Relative) — Newport, Wn
(Name) (Address)

U. S. Immigration & Naturalization Service
RECEIVED Sep 24 1937
District Office
Spokane, Washington

R. Horn (Name) (Friend) Twisp, Wn (Address)

The circumstances requiring my presence in the United States are as follows:

I came here principally to visit friends and relatives but decided to go into business after staying here a couple of months.

Financial condition of alien abroad Several hundred dollars cash.

I (am ~~am not~~) employed in the United States. (If employed, state nature of occupation and by whom employed.) _____ (Name) _____ (Address)

My employment began _____ (Month) (Day) (Year)

My monthly salary or wages are _____

I (am ~~am not~~) engaged in business in the United States. (If engaged in business, state nature, character and location of the business.) I own along with another partner and manage a small cafe in the town of Twisp, Was.

My monthly income derived from such business if $150.00 to $200.00 per month. ~~one hundred to one hundred & fifty per month~~

(If not employed or engaged in business in the United States, describe fully the source and amount of your income.)_____

I desire to secure an extension of 3 months to my present temporary period of admission and submit herewith in detail the reasons why I cannot depart at the time as originally fixed or as previously extended as my presence is required here to look after this business the very busy hunting season coming on I intend to return to Canada and make formal application for permanent entry to the U.S.A. at the end of this requested 3 months.

WILLIAM RICKETTS
(Signature of alien)

(THE ABOVE STATEMENTS MAY BE SWORN TO BEFORE ANY IMMIGRATION AND NATURALIZATION OFFICER WITHOUT COST)

State of Washington :
: ss:
County of Okanogan :

Subscribed and sworn to before me this the 21st day of September, 1937

(SEAL) J. S. ALLEN,
Notary Public
~~Officer Title~~

Note - This form, properly executed by the alien, must be forwarded to the immigration and naturalization officer in charge at the port of arrival in the United States, not less than 15 nor more than 30 days prior to date fixed for departure.

Important. - One application may be filed as to several members of a family group if all of them arrived at the same port on the same day and by the same means of conveyance, but as to any member of a family group who arrived at a different port, or on a different day, or a different manner, a separate application must be filed.

(LAST PAGE DEFENDANT'S EXHIBIT 7)

(Testimony of William Wade Ricketts.)

Mr. Erickson: I think that's all.

Redirect Examination

By Mr. Young:

Q. Now, then, Mr. Ricketts, in connection wi this voting that you told the Immigration peop that you had done in Canada, as I understand, y told them you voted once in Canada?

A. That's right. [42]

Q. Will you tell Judge Driver the circumstanc surrounding circumstances, of that vote in Cana that you refer to?

A. Well, I was working as a farm hand on farm at Ensign, Alberta, and I was out in a fie driving horses, out in the field plowing. My near neighbor came to the field I was plowing with t strangers. Who they were I do not know, and asked me if I had voted yet. It appears that it w voting day for some office, I do not remember wh it was, and they asked me if I had voted. I ma the statement "I'm not allowed to vote, I'm not the voting list." They said "Well, it doesn't ma any difference, we'll vote you anyway; we need t votes. Jump in the car, we'll take you up to t

(Testimony of William Wade Ricketts.)

Q. 1927; how old were you at that time?

A. I would be about twenty five years old.

Q. About twenty five. Now, with respect to the holding of public office in Canada, when did you hold public office in Canada? What year was it?

A. That was 1919 and 1920.

Q. How old were you at that time?

A. I would be seventeen and eighteen years old.

Q. And what was the general office that you testified to, or told the Immigration officers that you held?

A. Well, I was secretary of the school board, and——

Q. By the way, now, where was this?

A. That was at Meeting Lake, Saskatchewan.

Q. How large a community was that?

A. A very small community; isolated community.

Q. Do you know what the circumstances were, that led to the selection of a seventeen year old boy to do that work?

Mr. Erickson: To which we object as immaterial, what the political background was.

The Court: I'll overrule the objection.

Redirect Examination
(Continued)

Q. What occasioned you having that job at seventeen and eighteen?

A. Well, the fact that it was a new district, a lot of foreigners who couldn't even write English, and they had to have some person with the English

(Testimony of William Wade Ricketts.)

language, to correspond for them, conduct their public affairs. A lot of them couldn't read and write English at all.

Q. Was that a full time job, or part time job?

A. No. no, it was just—— [44]

Q. Just what?

A. Just about one day a month, I worked at it.

Q. One day a month. I see. Aside from the time that you mentioned, that you voted in 1927, did you ever vote in any other election in Canada?

A. I did not.

Q. Did you have any vote, or did you vote in the election that led to your becoming secretary, to the office that you described?

A. I did not.

The Court: The legal voting age in Canada is twenty one, isn't it?

Mr. Young: I think it is.

The Court: Is the legal voting age in Canada twenty one? Is that conceded?

Mr. Erickson: Yes.

Redirect Examination

(Continued)

Q. Now, with respect to your draft registration, at the time you registered, was the Immigration people, were the Immigration people, contesting your——

Mr. Erickson: To which we object as leading and suggestive.

Q. All right. What was the circumstances under

(Testimony of William Wade Ricketts.)

which you executed this selective service questionnaire?

A. Is that the original questionnaire, first registration? [45]

Q. No, it is not. You mean the occupational registration? A. Yes.

Q. No, this is the Selective Service questionnaire.

A. Well, what circumstances?

Q. What are the circumstances of your execution of that instrument? I might state that if the Court cared to take a recess at this time I could go over these exhibits.

The Court: The Court will be at recess for ten minutes.

(Short recess.)

(All present as before, and the trial was resumed.)

Redirect Examination
(Continued)

Q. Now, I hand you Defendant's Exhibit 1, and I will ask you to relate to Judge Driver the circumstances under which that exhibit was executed by you.

A. That was prepared by me for a special board, I believe in the Hutton Building in Spokane, Selective Service Board, and this is a list of the questions they asked me.

Q. Now, at that time, had you had difficulty with

(Testimony of William Wade Ricketts.)

the United States Immigration Service, and did you make that disclosure to the Selective Service Board? A. I did.

Q. At the time that you executed this Exhibit 1 did you have pending an application for re-entry into the United [46] States, before the Immigration Board? A. I did.

Q. Who was it that told you that you were a citizen of Canada?

Mr. Erickson: To which we object.

The Court: It is leading, in a way. The objection is sustained.

Redirect Examination
(Continued)

Q. State whether or not the Immigration authorities of the State of Washington, I mean of the United States, made any statement to you concerning your citizenship? A. They have.

Q. If so, what was it? What did they tell you?

A. They have told me repeatedly that I was a Canadian.

Q. Following your incarceration and later deportation to Canada, state what, if anything, the Immigration authorities told you with respect to the best procedure for you to follow in getting back into the United States?

A. They advised me——

Mr. Erickson: Just a minute. I object unless a time and place and particular individual is identified, as near as he can, so we know what he's talking about.

(Testimony of William Wade Ricketts.)

The Court: Objection sustained. I think he should specify, if possible, the time and place and person. [47]

Redirect Examination
(Continued)

Q. Who was the first person, and give me the time, that suggested to you that you go back to Canada, that is, after your deportation, go back to Canada and attempt to get back into the United States on the basis of being a Canadian citizen?

A. Mr. James Sullivan.

Q. When did that occur?

A. That was—I do not remember the exact date, April of 1933, I believe; the first week in April of 1933.

Q. And who is Mr. James Sullivan?

A. The gentleman sitting there; he's an inspector of the Immigration Service.

Q. Now, did you attempt to follow his advice?

A. I did.

Q. Did you make applications for re-entry into the United States? A. I did.

Q. On the theory that you were a Canadian citizen? A. I did.

Q. When did you make your first application?

A. I made my application before the Immigration Service Board of that year, three years ago, the first application.

Q. Three years ago? [48]

A. Yes; I do not remember the exact date I made that application; it was shortly after.

(Testimony of William Wade Ricketts.)

Q. Now, this Selective Service Exhibit there, signed and dated the 7th day of March, I believe it is, 1942, state whether or not prior to the time of the execution of that exhibit you had been—you had received information from the United States Immigration Service with respect to your status as a citizen? A. I had.

Q. From whom did you receive that information?

The Court: What does this have reference to, Mr. Young?

Q. Antedating Exhibit 1.

A. Inspector Kelly.

Q. Give the time and place, when you received that information.

A. My first trip down here in 1925. I was crossing the border at Eastport.

Q. Now, did you think it best at that time to attempt to accept the conclusion that you were a Canadian citizen, and work your way in through the Immigration laws? A. I did.

Mr. Erickson: To which we object as leading and suggestive.

The Court: Well, I'll let it stand. It was leading. [49]

Redirect Examination
(Continued)

Q. I don't mean to lead, but it is a rather technical subject. Calling your attention to Exhibit No. 3, which is an Alien registration exhibit, apparently,

(Testimony of William Wade Ricketts.)

state the circumstances under which that exhibit was executed by you.

A. This form was handed to me by the Immigration Service in the Welch Building with instructions as to filling it out and applying for entry, legal re-entry, into the United States.

Q. What, if anything, was said to you as to what would happen in the event you refused to execute this instrument?

A. Well, I was given the impression that I would be——

Mr. Erickson: Now, just a minute.

Q. Not just the impression; what was told?

A. I was told that I would be prosecuted for illegal entry if I did not.

Q. State whether or not you executed that instrument under duress?

The Court: I think that's calling for a conclusion.

Q. Did you believe that you would be prosecuted for illegal entry, and put in jail, in the event you did not sign [50] this instrument?

A. I did.

Q. Now, calling your attention to—I am showing one, Exhibit Number 2; here, I have Number 1.

The Clerk: Number 2 is the instrument executed before the Immigration Service in August, 1943.

Q. May I straighten up the record? The instrument that I last referred to was Defendant's Exhibit Number 2, mistakenly referred to as Exhibit Number 3, which was the General Information

(Testimony of William Wade Ricketts.)

Form supplied by the United States Department of Justice. Handing you Exhibit Number 3, which is a manifesto, apparently, or a manifest from the Immigration authorities, will you state the circumstances under which that was executed by you?

A. That form was made out before Inspector Brunner of the Immigration Service, and is a questionnaire of what my intentions were when I crossed the border September 6, 1936.

Q. At that time had you accepted the conclusion, or were you impressed, at least, by the conclusion that was given you by the Immigration authorities that you were in fact a Canadian citizen?

A. I did.

Q. And did you have pending at that time an application for re-entry into the United States?

A. No.

Q. You did not. Were you attempting to come into the United States for some purpose at that time? A. Yes.

Q. And the form was handed you and you filled it out?

A. I did not fill that in. I signed it.

Q. That was made at the entry? A. Yes.

Q. Well, the language that appears there in connection with your citizenship, that was filled in by the Immigration man there, is that correct?

A. Yes, that's right.

Q. Calling your attention to Defendant's Exhibit 4, I will ask you to narrate the circumstances under which you executed that document.

(Testimony of William Wade Ricketts.)

A. That was also made under the same circumstances. I believe that this is the original form.

Q. This is 1936? A. Yes.

Q. Was it your purpose to get across the border and get into the United States. A. Yes.

Q. Did they require you, or were you required by anyone to fill out this form in order to get into the United States? [52] A. Yes.

Q. Did you fill it out for the purpose of getting into the United States? A. Yes.

Q. Did you state to anyone at the border anything with respect to your citizenship other than what has been written here? A. Yes.

Q. To whom did you make a statement at the border with respect to your citizenship, your claimed citizenship?

A. At this present date I discussed it with Inspector Brunner of the Immigration Service.

Q. Inspector Brunner of the Immigration Service? A. Yes.

Q. What did you tell Brunner?

A. I told him I was an American.

Q. What did he tell you?

A. He told me I was a Canadian.

Q. And did he require you to fill out that form in order to come into the United States?

A. Yes.

Q. Was your desire to come into the United States important to you? A. Yes.

Q. Did you sign the form? [53] A. Yes.

(Testimony of William Wade Ricketts.)

Q. You did accept the statement that you were a Canadian in order to get in, is that correct?

A. For the purpose of getting into the United States.

Q. Now, after you were in the United States were you asked to sign an application to stay longer in the United States? A. I was.

Q. Was that application contained in Defendant's Exhibit 5, which you now have in your hand?

A. That's right.

Q. Was your citizenship challenged, or had it been challenged at that time by the Immigration authorities, at the time you executed that instrument? A. Yes.

Q. State what, if anything, was said to you about the necessity of executing Exhibit 5, and who told you that it was necessary to execute it?

A. Captain Brunner, Inspector Brunner of the Immigration Service told me that the Immigration Service ruling was that I was a Canadian, and in order to remain in the United States longer than the previous time I had been here, I must make this application.

Q. What, if anything, did the inspector that you mentioned tell you would happen to you in the event you failed to [54] make the application?

A. He stated that I would be apprehended and deported.

Q. Did you actually believe that unless you made the application in the form that is suggested there, that you would have been put in jail and later deported? A. I did.

(Testimony of William Wade Ricketts.)

Q. And in that state of mind you executed that document? A. That is so.

Q. Calling your attention to Defendant's Exhibit 6, I will ask you to relate the circumstances under which you executed that instrument.

A. This is a statement executed when I returned from a visit to Canada after the expiration of this temporary stay. I crossed the line at Laurier, Washington, and I was required to fill out that form.

Q. What, if anything, did you state to the man at the border as to your claim of citizenship?

A. I did.

Q. Well, what did you tell him?

A. I told him that I was an American returning home, and he told me that I was not, that I was a Canadian applying for a visit to the United States.

The Court: That's 6?

Q. That's 6, yes. State whether or not you were informed as to whether you could or would be permitted to cross [55] the line unless you signed that?

A. I was told that I would not be permitted to cross the line unless I signed that.

Q. Did you believe that?

A. I did.

Q. Was your reason for coming into this country an important one to you?

A. Yes, it was.

Q. And did you execute it? A. I did.

Q. Calling your attention to Defendant's Exhibit

(Testimony of William Wade Ricketts.)

7, will you tell us the circumstances under which that was executed?

A. Yes, I obtained this application form through the mails.

Q. From whom?

A. From the Supervisor, I believe it was, of Immigration. Mr. Wyckoff used to be in Spokane, here, and I wrote to him requesting a further stay, and he sent me this application form to fill in.

Q. At that time were you attempting to secure a right of entry through prescribed rules of the Immigration Service of the United States?

A. Yes, at that time I was.

Q. And what, if anything, was told to you in correspondence or otherwise with respect to the necessity for making [56] that application.

A. I wrote to Mr. Wyckoff——

Q. ——contained in Exhibit 7?

A. ——from my place of business at Twisp requesting information as to what I should do to obtain a permanent stay in the United States, and in the event that it would take considerable time, he sent me this application form to fill in, to remain here for another three months, until I got the necessary legal papers together to properly apply for admission as a permanent resident of the United States.

Q. And that was the circumstances under which 7 was executed? A. That's right.

Q. Now, have you discussed your citizenship

(Testimony of William Wade Ricketts.)

status with the Immigration and Naturalization people of Canada? A. Yes.

Q. And England? What, if anything, are you informed with respect to your status as a citizen as far as they are concerned?

Mr. Erickson: To which we object.

The Court: I'll sustain the objection. I don't think that is material.

Redirect Examination
(Continued)

Q. Are you able to obtain services—have you made an attempt to obtain service from the British Government or [57] Canadian Government?

Mr. Erickson: To which we object as incompetent.

The Court: I think you may show what the situation is as it affects him. I sustained the objection because I don't want the conclusion as to what the British officials ruled, but anything that affects him. Was this last question answered?

Mr. Young: He said not, I apprehend. My information is this form is——

A. I misunderstood the question.

Q. Don't answer this question. It may be objectionable. Are you recognized as a Canadian citizen or British subject in Canada?

Mr. Erickson: To which we object as improper.

The Court: Well, I'll overrule the objection, not that it will have any bearing as to whether or not he is a citizen of Canada, but merely as it may

(Testimony of William Wade Ricketts.)

affect him and explain his actions and declarations.

(Whereupon the reporter read the last previous question.)

A. No.

Q. Have you endeavored, in carrying out your plan of coming back into the United States, accepting the conclusion of the Immigration people here that you are a Canadian citizen? [58]

A. Yes.

Q. Have you attempted to secure documents necessary from the Canadian Government or the British Government? A. Yes.

Q. What has been your success?

A. I have had no success.

Q. And this again is hearsay—don't answer this. What have you been advised by the British or Canadian Immigration authorities as to your status of citizenship?

Mr. Erickson: To which we object.

The Court: I'll sustain the objection.

Q. During the time that the local Immigration authorities have been discussing this question of citizenship with you, you have had a number of hearings, have you? A. Yes, I have.

Q. Did anyone suggest to you that it would be the better plan for you to accept the definition of your citizenship given you by and placed upon it by the United States Immigration authorities, and if so, who was it?

(Testimony of William Wade Ricketts.)

A. Inspector Sullivan of the United States Immigration Service.

Q. When did that occur?

A. That occurred a number of times in the course of the last three years.

Q. And these admissions that you have made, state whether or [59] not they were made on advice of Inspector Sullivan or anyone else in connection with the Immigration Service?

A. They were made under the advice of various Immigration Service men.

Q. State whether or not you took an appeal from —strike that; that's all.

Recross-Examination

By Mr. Erickson:

Q. Well, Mr. Ricketts, it is only in the last three years that the Immigration Service has been after you to admit that you were a Canadian citizen, is that correct? A. No.

Q. How long?

A. Pretty near ten years, since 1936.

(Whereupon, letter dated September 27, 1937, was marked Defendant's Exhibit No. 8 for identification.)

Recross-Examination
(Continued)

Q. I hand you Defendant's identification 8, and ask you to state whether or not that is your handwriting, your signature on the back side.

A. That is my signature on the front, there.

(Testimony of William Wade Ricketts.)

Q. On the front, yes.

Mr. Young: I think that the exhibit is a borderline on the basis of an admission. I am going to object to it as incompetent, irrelevant, immaterial. There is some statement in that that would affect his conclusion as [60] to how his father's naturalization affected him.

The Court: I will admit the identification.

(Whereupon, Defendant's Exhibit No. 8 for identification was admitted in evidence.)

DEFENDANT'S EXHIBIT "8" 9

(Stamp "Received
Sep 28 1937
Imm & Nat
Service
Spokane, Wash.)

9014
——
5408

Twisp, Wn
Sept 27th 1937

The U. S. Dept. of Labor

Immigration and Naturalization Service
Spokane, Wn.

Dear Sirs: Your letter re my application for extension of my temporary stay in this country to hand. In reply to your questions regarding my Canadian Naturalization, may say

I was born Feb. 3rd, 1902, at Hydro, State of Oklahoma, moved with my parents to Mullingar, Saskatchewan in July 1910 where my father took

(Testimony of William Wade Ricketts.)

up a homestead and where he became a citizen of Canada by Naturalization when he secured patents of title to his homestead about the year 1914 or 1915. I do not know the exact date, but could secure it if necessary. His naturalization while I was under age made me a citizen of Canada and I was never naturalized in my own name.

My father still resides at his homestead at the P. O. Mullingar, Sask. I think these records can be secured at the Land Titles Office, Prince Albert, Sask.

Thanking you I am Yours respectfully

WILLIAM RICKETTS

(over)

My Father's name is
Seigle E. Ricketts
Address
Mullingar, Sask.

Recross-Examination
(Continued)

Q. Now, Mr. Ricketts, did you ever apply for a Canadian passport? A. Yes.

Q. And I will ask you if on June 24, 1944, you did not write a letter to Mr. Guy Walter of the United States Immigration Service in Spokane, Washington, stating that——

Mr. Young: The letter would be the best evidence.

The Court: Well, he can identify it by asking

(Testimony of William Wade Ricketts.)

if he wrote such a letter. If you're going to use it extensively you had better identify it.

(Whereupon, letter dated June 24, 1944, was marked Defendant's Exhibit No. 9 for identification.)

Recross-Examination
(Continued)

Q. I will ask you if you wrote this letter to Mr. Walter of the Immigration Service in Spokane, if it is in your handwriting?

A. Yes, that is my handwriting.

Q. Your signature appears thereon?

A. Yes, that's my signature.

The Court: What is the date of that? [61]

Mr. Erickson: The date is June 24, 1944.

Mr. Young: I am going to make the objection, for the record, incompetent, irrelevant, and immaterial.

Mr. Erickson: The purpose for which I am offering it is to show that about the middle of the first page, that he applied for a Canadian passport and visa and obtained it.

Mr. Young: If that is the purpose I will withdraw my objection. I can see where that would be germane to the inquiry, all right. I understand that it is limited to that purpose, however.

Mr. Erickson: It is also offered for the purpose of contradicting certain oral testimony.

The Court: It will be admitted.

(Whereupon, Defendant's Exhibit No. 9 for identification was admitted in evidence.)

(Testimony of William Wade Ricketts.)

DEFENDANT'S EXHIBIT "9"

9012/7999. U. S. Immigration & Naturalization Service. Received Jun. 26, 1944; District Office Spokane, Washington.

Empire Hotel, Calgary, Alta, Room 6, June 24, '44

Mr. Guy Walters
U. S. Immigration Office
Welch Bldg., Spokane

Dear Sir: It was with great disappointment that I received the copy of letters sent to Mr. Allan of the American Consulate, Calgary, refusing me permission to reapply for legal entry to the United States. I had departed quite willingly from the U. S. as your office had requested. Came to Calgary and at great expense and inconvenience had secured all the necessary papers, documents, passport, etc., to properly obtain an immigration visa and Mr. Allan was prepared to issue same to me, when your letter came.

Now, Mr. Walters, altho I know the *the* U. S. Immigration Service has been very considerate of me in view of my past offenses, I am going to ask the Central Board, through your office to go a step farther on my behalf and reconsider their decision of refusing me legal reentry to the land and country I call home.

I wish to point out that I have a very substantial little business there in Spokane, which at present is closed, awaiting my return, also that from the records of your own investigation of me, I have

(Testimony of William Wade Ricketts.)
been proven to be a decent lawabiding self supporting and worthy citizen.

Also may I say if I am permitted to return to Spokane, I will continue to be as worthy a citizen as it is in my power to be. Some friends of mine there in Spokane will be calling on your office at the Welch Bldg., in the course of a few days regarding an appeal to the Central Board on my behalf, for reconsideration of their decision to exclude me from my home.

I earnestly beg of your office to accept the evidence they present and to forward same to the proper persons and help me to obtain clemency on my case.

Trusting to hear from you favorably I remain,

Yours respectfully,

WADE RICKETTS.

Recross-Examination
(Continued)

Q. You did know that at the time you applied for and obtained this Canadian passport and visa, or this visa and passport in Canada, that you would have to be a Canadian citizen or British subject to get it?

A. No, I did not.

Q. You think the authorities in Canada could issue a passport to a foreigner?

Mr. Young: Objected to as argumentative. [62]

The Court: He may answer if he knows.

(Testimony of William Wade Ricketts.)

A. Well, I don't know. The point is a technical one; I'm not versed in it.

Q. One thing I forgot to ask you was in the Immigration hearing before Inspector Sullivan were you asked the following question: "Question: Have you voted more than once in the general election in Canada?" and did you give the following statement: "Answer: No, I was moving around so much I did not have time to get my name in the registration. I voted in the provincial election in 1927, I think, but I never voted in the Dominion election." Did you make that statement?

A. Not in those words. I made the statement I voted once.

Q. Then were you asked "Wasn't there a Dominion election in 1927 also?" Answer: "No, the Dominion election was 1930. I tried to vote at that time but they refused me because I was out of my home constituency. I think the Dominion elections were in 1925 and 1930." Did you answer that?

A. Yes.

Mr. Erickson: I think that's all.

Redirect Examination

By Mr. Young:

Q. Now, at the time you wrote this letter, Exhibit 9, what is the fact with regard to securing or the non-securing of a visa and passport?

A. It is not a visa. [63]

Q. What did you get?

A. I had what they call a passport.

A. A passport?

(Testimony of William Wade Ricketts.)

A. Yes. That was under the advice of the Immigration Service, I should go to Canada, obtain a Canadian passport or British passport, and apply for an American visa, which I did do, and I was refused a visa.

Q. Have you got what it is that you received from Canada with you?

A. No, I haven't it with me.

Q. Is it available?

A. Yes; not, it's not.

Q. It isn't available; where is it?

A. I think it's out in the camp, up in the woods.

Q. You at the present time are engaged in the logging business? A. Yes.

Q. Where is your logging camp?

A. At Long Lake.

Q. Now, you were advised by Mr. Walter, you say, to go back to Canada? A. Yes.

Q. And make application for some instrument that was necessary to your coming in for permanent stay in the United States? [64]

A. That's true.

Q. And you attempted to carry out his instructions? A. I did.

Q. Your letter, Defendant's Exhibit 9, was written to him explaining the difficulty that you had encountered, is that correct?

A. That's right.

Q. Did you ever at any time following the attainment of your age of majority intend to ex-

(Testimony of William Wade Ricketts.)

patriate yourself? Do you understand the meaning of that term? A. Yes.

Q. How's that?

A. I didn't think I had to be expatriated.

Q. Well, did you intend to give up your American citizenship? A. No.

Mr. Young: That's all.

(Whereupon, there being no further questions, the witness was excused.)

Mr. Young: I have some affidavits, but I have one witness who wants to get away. I understand he has an appointment.

The Court: How long will it take you to examine him?

Mr. Young: He's a very short witness.

The Court: Call him, then. [65]

ERNEST McCALL

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Young:

Q. State your name to Judge Driver, please.

A. It's Ernest McCall.

Q. Where do you live?

A. I live at 6024 North Colton at the present.

Q. How old are you? A. Fifty two.

Q. Do you know Mr. Ricketts, the plaintiff in this case? A. I've known him since 1939.

(Testimony of Ernest McCall.)

Q. Where did you first meet him?

A. He went up cutting logs for me for a little while.

Q. Where was that?

A. At the Spokane Bridge.

Q. Did you have occasion to discuss with him his citizenship or claimed citizenship?

A. Yes, we talked it over a good many times.

Q. And what, if anything, did he tell you about his claim of citizenship, or what citizenship he was, what country? A. He always claimed——

Mr. Erickson: I object to that. I don't think the place has been fixed, or the time, or the circumstances. [66]

Q. Well, where did you have your conversations with him with respect to his citizenship, the first time you discussed it with him?

A. I think the first time, if I remember right, was in the timber when he worked for me.

Q. And where was that?

A. South of Spokane Bridge.

Q. And when was that?

A. I believe that was the summer of 1939.

Q. What, if anything, did he say to you about his citizenship——

Mr. Erickson: To which we object as being a self-serving declaration. At that time his trouble was pending.

The Court: I will admit it for the purpose of bearing on his intent. That's what it is offered for?

(Testimony of Ernest McCall.)

Q. Yes, and I have a case that seems to admit it. You may answer.

A. He always claimed he was an American citizen.

Q. Did he discuss with you any difficulties he was having in establishing his citizenship?

A. Yes; he told me his folks went to Canada—I don't remember just exactly—they had taken out papers in Canada but he never did.

Q. I see. Did you have any more than one conversation with [67] him with respect to his citizenship?

A. Yes, we've talked at different times. I've been in touch with him most of the time since then. He's been having a little trouble, and he's talked it over at different times.

Mr. Young: You may inquire.

Mr. Erickson: There aren't any questions.

(Whereupon, there being no further questions, the witness was excused.)

The Court: The Court will recess until two o'clock today. That will give the court a little time during the noon recess.

Mr. Young: Your Honor, I have a situation in Judge Webster's court; we tried a case, and the Judge is ready to render his opinion, and wants to render his opinion deciding it. I told him I would take the matter up with you. He told me it wouldn't take very long, but he wanted all the parties and attorneys in court at the time he renders his opinion. I was wondering if it would be thoroughly conveni-

ent with everyone if we could take up at three o'clock, for instance?

The Court: How long will it take to finish the case, do you think?

Mr. Young: Well, I think it will probably take a day and a half, that is, my case. We have some depositions [68] to read, and of course, I have no way of knowing the length of the government's case.

The Court: I had something set for tomorrow, arraignments, at 1:30. Do you have any objection to that?

Mr. Erickson: I have no objection. I am glad to accommodate counsel.

The Court: We will recess, then, until three o'clock this afternoon. Everyone in connection with this case may be excused. I understand there is an ex parte matter to be presented. Please withdraw as quietly as you can.

(Whereupon, the Court took a recess in this cause until 3 o'clock p.m.)

Spokane, Washington, September 30, 1946,
3 o'clock p.m.

(All parties present as before, and the trial was resumed.)

MARION RICKETTS

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Young:

Q. Your name is Marion Ricketts?

A. Marion Ricketts.

Q. And you are the uncle of Wade Ricketts, the plaintiff in this action? [69] A. Yes.

Q. You and Wade Rickett's father were full brothers, is that correct?

A. Full brothers.

Q. How old a man are you?

A. Sixty-six.

Q. Were you—do you know when Wade was born?

A. I was down there when he was born.

Q. Where was Wade born?

A. He was born in Hydro, Oklahoma.

Q. How old a man were you at the time he was born?

A. I was about twenty; around twenty two, I guess, something like that.

Q. What knowledge did you have of his birth and the place of his birth?

A. Well, I was there when the baby was born, and my brother always looked after them when they was born.

Q. And you of your own personal knowledge know he was born in Hydro?

(Testimony of Marion Ricketts.)

A. On the farm out from Hydro.

Q. Did you and your brother go to Canada?

A. Yes.

Q. You first, or your brother?

A. He went first.

Q. And then you followed him? [70]

A. Yes.

Q. You have a family, do you?

A. Yes.

Q. What does your famliy consist of, three boys? A. Three boys.

Q. What did your brother's family consist of?

A. Boys.

Q. How many?

A. I think there's about eight of them.

Q. Now, did your brother take up a homestead in Canada? A. Yes.

Q. And then later you took up a homestead?

A. No, I never did take one up.

Q. You learned that your brother had become a British subject by naturalization?

A. That's homesteading, yes.

Q. And proving up on it. A. Yes.

Q. Did you become a naturalized citizen, too, up in Canada? A. Yes.

Q. How old was Wade, about, when your brother became a citizen of Canada, or a British subject?

A. Well, I couldn't say just exactly, but he must have been about fourteen or fifteen years old, somewheres along in there. [71]

(Testimony of Marion Ricketts.)

Q. Did you have occasion to visit your nephew while he was in Canada, after he become twenty-one? A. Yes, once.

Q. Where was that visit?

A. That was up at Hydro—or at North Battle Creek.

Q. In what province was that?

A. That was Saskatchewan.

Q. What was the circumstance of your visiting him? A. I went up to see my brother.

Q. And Wade had become twenty one, had he? He was a man?

A. He was right around twenty one, anyway; I don't know just exactly.

Q. Was he married at that time?

A. No.

Q. What, if anything, did he say to you with respect to his intention or lack of intention to become a British subject or Canadian citizen?

Mr. Erickson: I object until he fixes the time more specifically, as to what year it was, something more definite.

Q. Can you fix the time specifically, definitely as you can, as to the year it was that you were visiting Wade?

A. I was up there in '16, and I was there in '19, and it must have been 1920, around there, when I——

Q. It must have been in 1920? [72]

A. Right around there somewheres.

Q. Well, what if anything was said by Wade

(Testimony of Marion Ricketts.)

with respect to his intention or lack of intention of becoming a British subject?

Mr. Erickson: To which we object, if it was 1920, because he was still a minor in 1920.

The Court: I think it might have some probative value as indicating what his intention was afterwards. Of course he hadn't any right to make an election during his minority, but it would have some evidentiary value.

Mr. Young: I am somewhat surprised by the answer of this witness, because we took his deposition by agreement, and we took it for the purpose of preserving his testimony, having in mind the uncertainties of life, and if I recall correctly, counsel may have a different recollection, Mr. Ricketts was established in his own establishment, and he was visiting him there. It may be that I don't recall the testimony correctly. For the purpose of refreshing your recollection, did you or did you not at the time of taking your deposition tell us you were visiting Wade in his home up in Canada?

A. Up at his folks.

Q. Well, maybe I misunderstood you. It was his folks' home? A. Yes.

Q. Well, with respect to the time, was Wade more than twenty [73] one or under twenty one at the time you were talking with him?

A. Well, the last time I talked to Wade I was talking to him about my boys, and about him, coming to Canada, or to the States. He was of age then, because my boys said they wouldn't take

(Testimony of Marion Ricketts.)

papers out up there, which they didn't, and my nephews, they wasn't going to take papers out because they wanted to come back.

Q. You mean others, including Wade?

A. Yes, and my three boys. They wouldn't take theirs out, and they're here now.

Q. By the way, did Wade participate in that conversation with you about whether they were going to take their papers out or not?

A. Yes, Wade was talking about it, about my boys and about him taking his papers.

Q. And specifically, now, what did he tell you?

A. Well, he said he wouldn't take his papers out. He was an American and he was going to stay one.

Q. Now, do you know whether or not the remainder of Wade's brothers, the remainder of Wade's family, his brothers and sisters, do you know whether or not they are here in the United States as citizens, and claim citizenship?

Mr. Erickson: To which we object as immaterial in this case. [74]

The Court: I think I'll sustain the objection. It depends on the individual.

Cross-Examination

By Mr. Erickson:

Q. Mr. Ricketts, was that in 1920 that you were up there and talked to Wade?

A. Well, 1920, 1921, along in there someplace. I don't remember just when it was. I used to just take a notion to go, and go.

(Testimony of Marion Ricketts.)

Q. Well, did Wade tell you he was going to stay up there, or what did he say?

A. The way I always understood it, he was coming back here.

Q. Well, what did he tell you?

A. Yes, he said he was going to come back to the States.

Q. When?

A. Well, he didn't say when. The same as my boys; they said they was going to come back, and all at once they come.

Q. Didn't say whether as a visitor or to live.

A. Well, I won't say that. I supposed when he said he was coming back he was coming to stay.

Mr. Erickson: That's all. Oh, just one more question. Was Wade married when you were up there? A. No.

Q. He was living with his folks?

A. Yes, working out.

(Whereupon, there being no further questions, the [75] witness was excused.)

ALBERT W. CULL

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Young:

Q. Your name is Cull?

A. Albert W. Cull.

(Testimony of Albert W. Cull.)

Q. And where do you live?

A. 604 West 13th Avenue.

Q. What business are you engaged in?

A. I am general agent for Western Life Insurance Company.

Q. And are you acquainted with the plaintiff in this case? A. I am.

Q. How long have you known him?

A. Approximately five years.

Q. When did you first become acquainted with him? A. I think it was in December of 1942.

Q. Where was he?

A. In his restaurant in the Empire Building here.

Q. You became acquainted with him in December of 1942? A. I think that was it, yes.

Q. What was the circumstances of your making his acquaintance?

A. I canvassed him as a possible prospect for insurance.

Q. Did you have occasion to discuss with him his citizenship [76] or claimed citizenship?

A. Not at that time; not until June of 1943.

Q. Do you know whether or not he had been operating the restaurant that you refer to for any time prior to the time you made his acquaintance?

A. Yes, he had been there, for he told me at that time that business hadn't been the best while he had been there, for some time before that; I don't know the exact number of months.

(Testimony of Albert W. Cull.)

Q. Now, when was the first time you had occasion to inquire as to his state of citizenship?

A. June 19, 1943.

Q. What was the circumstances of your making that inquiry?

A. I was writing up an application for insurance, and among the questions there is "Are you a citizen of the United States?" and he said yes, he was.

Q. Have you that application?

A. I have; this is a photostatic copy on the back.

Q. Is this part of an original policy?

A. That is the policy.

(Whereupon, Application for Insurance (being a part of an insurance policy) was marked Plaintiff's Exhibit A for identification.)

The Court: I suppose you want to substitute a copy? [77]

Mr. Young: Yes, I would, your Honor.

The Court: That may be done.

Mr. Young: Can you arrange for a copy of that to be made available?

Witness: It will have to be photographed.

Mr. Young: Maybe we'd better type a copy, then.

The Court: I didn't mean a photostatic copy. I just assumed you wouldn't want a man's insurance policy in evidence here.

(Testimony of Albert W. Cull.)

Direct Examination

(Continued)

Q. The application that you have been referring to is plaintiff's Exhibit A for identification, is that correct?

A. That is correct, and this man's signature is there. Here's another one where he swore the same thing to the doctor.

(Whereupon, copy of physician's examination was marked Plaintiff's Exhibit B for identification.)

Mr. Young: I offer plaintiff's identification A.

Mr. Erickson: No objection.

The Court: It may be admitted.

(Whereupon, Plaintiff's Exhibit A for identification was admitted in evidence.)

PLAINTIFF'S EXHIBIT "A"

(Part I) B-C1

(Use Black Ink Only)

Application for Insurance

I, the undersigned, hereby make application for a policy of Life Insurance upon my life in the Western Life Insurance Company, Helena, Montana, and in connection therewith and as a part thereof state that:

1. My name is William Wade Ricketts.
2. I was born at Hydro, Okla.
3. My date of birth is Month, Feb.; Day, 3; Year, 1902.

(Testimony of Albert W. Cull.)

Plaintiff's Exhibit A—(Continued)

4. My age, nearest birthday, is 41. My sex is male.

5. At my death this insurance is to be paid to: Full name: Gordon Cecil Ricketts and Burke Evan Ricketts, Millinger, Sask., whose relationship is sons—share and share alike or the survivor thereof, if living at the time claim is made, otherwise to: Wayne C. Ricketts, Winlock, Wash., whose relationship is brother, share and share alike, or to the survivor thereof, under the option chosen below. The right to commute payments after my death is.....given to the beneficiary.

Any Option May Be Selected

a. A cash payment of the net amount due at death to be made in one sum upon approval of claim. (Option "a" will be used if no other option is selected.)

b. The Company to retain the net proceeds for a definite period of time, and then pay in one sum or in installments.

c. A cash payment at death and the balance paid in installments. (If no cash is desired at death "None" should be inserted.)

d. The Company to retain the net proceeds due until the first of September in any given year and then pay the net proceeds in installments (usually monthly) for the nine school months of the year for four successive years, the remaining balance to be paid in one sum on

(Testimony of Albert W. Cull.)

Plaintiff's Exhibit A—(Continued)

the first day of June in the fourth year after the first payment of Income is made.

e. A life income (..... years guaranteed);

f. As a joint life survivorship income to the beneficiaries with provision to continue so long as a survivor lives. Under "e" or "f" it is necessary that the birthdate of the beneficiaries be given.

Note. Under "b, c, e, or f" payments may be made annually, semi-annually, quarterly or monthly, provided not less than $10.00 is payable monthly.

Indicate by letter option selected: A. Payment at death: Total. First Payment ..... Amount ..... Payments to be made ..... (Annually, semi-annually, quarterly or monthly.) Birthdates .....

6. I apply for $2174.00 of insurance on the K 65 L.I.M. (par) plan With the Following Additional Benefits: (Use this space to request Double Indemnity, Total Disability, Family Income, Annual Renewable Term, Survivorship, Social Security Riders and Return Premium Provision.)

.....

.....

7. The annual premium for this insurance shall be $115.46 payable in advance annually.

8. I apply for Initial Term Insurance to.....

3. The premium for such insurance to be $.....

(Testimony of Albert W. Cull.)

Plaintiff's Exhibit A—(Continued)

9. I request that the automatic provisions for loans to pay premiums apply. (If this privilege is not desired write "do not". Only applicable to policies that contain loan provisions.)
10. I have paid the agent the following settlement: Check for 115.46.
11. My residence address is: 110 No. Division, Spokane, Spokane County, Wash.
    (If in county) I live ..... miles in a ..... direction from ..... on ..... route .....
12. My business address is: 110 N. Division, Spokane.
13. Send premium notices to (Business) (Residence) address .....
14. My former residence address was: Spokane, Wash.
15. My present occupation is Restaurant Owner. My exact duties are Manage & Cook. My employer's name and address are self.
16. I have not within five years changed my occupation, nor do I contemplate doing so except as follows—No.
17. I do not intend to visit or reside outside the United States, nor do I contemplate any special undertaking except as follows: .....
18. I do not intend to make aircraft ascensions except as follows: .....
19. I own the following life insurance: None.

(Testimony of Albert W. Cull.)

Plaintiff's Exhibit A—(Continued)

20. I was last medically examined for life insurance during None.
21. The above life insurance provides for Double Indemnity of $ No.
22. I have no application pending in any company, association, society or order except as follows: None.
23. I have never applied to an agent, company, association or order, for a policy, or for reinstatement of a lapsed policy which was refused or issued on a plan or for an amount or at a rate different than applied for except as follows: None.
24. This insurance is not purchased for the purpose of replacing insurance in this or any other company except as follows: None.
25. If a participating policy, specify Dividend Option desired. I select Dividend Option No. (1) (2) (3x) (4)
Remarks: .....

.....

Home Office Corrections or Additions

.....

I agree on behalf of myself and any other person who shall have or claim any interest in any policy issued on this application as follows:

1. That if the first premium is paid in full with this application and the binding receipt attached hereto is issued to me by the agent, that the liability

(Testimony of Albert W. Cull.)

Plaintiff's Exhibit A—(Continued)

of the Company shall be as stated in such binding receipt.

2. That if such first premium is not paid in full with this application, the insurance hereby applied for shall not take effect unless and until the first premium is paid in full and the policy is delivered to me during my lifetime and while I am in good health.

3. That my acceptance of any policy issued on this application will constitute a ratification by me of any correction in or addition to this application made by the Company in the space provided for "Home Office Corrections or Additions," and shown in the copy hereof attached to such policy, unless specifically excluded by law in the State of my residence.

Signed at Spokane, State of Wash., this 19 day of June, 1943.

Witnessed by

A. W. Cull,

Agent.

/s/ WM. WADE RICKETTS.

Part II (Non-Medical)

Declaration of Insurability in Lieu of Medical Examination

In continuation of and forming part of application for Insurance to the

Western Life Insurance Company, Helena, Montana

The following statements are made with the

(Testimony of Albert W. Cull.)

Plaintiff's Exhibit A—(Continued)

understanding that the Company reserves the right to require me to submit to a medical examination.

This blank must not be used if the applicant and the agent are relatives.

1. What is your race? Color? White.
2. Are you a citizen of the U. S.? U. S.
3. Are you single, married, widowed or divorced? Single.
4. Are you now in good health to the best of your knowledge and belief? Yes.
5. Family record: In giving cause of death or ill health, avoid indefinite terms.

		Living Age	Living Health	Age at Death	Year of Death	Dead Cause of Death	How long Sick
Father				77	1939	Age Prostate Gland Operation	
Mother				60	1939	Gall Stones	2 yrs.
Brothers Number Living Number Dead	7	33 to 50	All Good				
Sister Number Living Number Dead	0	None					

(Testimony of Albert W. Cull.)

Plaintiff's Exhibit A—(Continued)

6. Has there ever been a case of insanity, tuberculosis, epilepsy, or suicide in your family? No.
7. Have you occupied the same house with a consumptive during the past five years? No.
8. Has any physician expressed an unfavorable opinion of your insurability or health? No.
9. Have you ever had, or been advised to have a surgical operation? Yes.
10. Has change of residence or occupation ever been sought or advised for the benefit of your health? No.
11. Have you any deformity, amputation or any physical disability? No.
12. Have you received any insurance benefits or compensation for illness or injury? No.
13. Have you ever used alcoholic stimulants to intoxication? No.
14. Have you ever taken, or been advised to take, treatment for the liquor or drug habit? No.
15. Do you, or have you ever used opium, cocaine or any other narcotic or habit forming drugs? No.
16. Give complete explanation if any of questions 6 to 15 inclusive are answered "Yes."

Ruptured & wears a truss—Never bothers him but has been advised to have it sewed up. #9.

(Testimony of Albert W. Cull.)

Plaintiff's Exhibit A—(Continued)

17. a. What is your exact height?
    a. 5 ft. 8½ in.
    b. What is your exact weight? b. 150.
    c. Has your weight changed in last two years? c. None.
    d. Amount and cause? d. None.
18. a. When did you last consult a physician, osteopath, chiropractor, or any practitioner? Never.
    b. Have you ever been under treatment at any asylum, hospital or sanitarium?
    No.
    c. Have you ever had dizziness, fainting spells, fits, or any nervous trouble?
    No.
    d. Have you any defect of sight or hearing?
    No.
    e. Have you ever had goitre, gout, or rheumatism? No.
    f. Have you ever had pleurisy, influenza, asthma, or any disease of the lungs?
    No.
    g. Have you ever had a cough, spitting of blood, or any other symptoms of tuberculosis? No.
    h. Have you ever had high blood pressure, shortness of breath, or any disease of the heart? No.

(Testimony of Albert W. Cull.)

Plaintiff's Exhibit A—(Continued)

i. Have you ever had any disease of the stomach, bowels, appendix, rectum, liver, or gall bladder or are you ruptured? No.

j. Have you ever had a cancer, tumor, or ulcers of any kind? No.

k. Have you ever had diabetes, or have you ever taken insulin or been on a restriction of diet? No.

l. Have you ever had a disease of the kidney or bladder? No.

m. Have you ever had syphillis, gonorrhea, or any other disease of the genito-urinary system? No.

n. Have you ever consulted a physician, osteopath, chiropractor, or any practitioner for a cause not included in any of the above questions? No.

19. Give complete explanation if any subdivision of question 18 is answered "Yes."

Illness or Injury Date Number of attacks Duration Remaining effects.

Name and Address of Attending Physician

.....

I hereby declare that I have read all statements and answers as written or printed herein and in Part I of this application and that the same are full, complete and true whether written by my hand or not. I further declare that no occurrence or in-

(Testimony of Albert W. Cull.)

Plaintiff's Exhibit A—(Continued)

formation concerning my past or present state of health, my habits of life, the amount of insurance in effect on my life on the date of this application, or the rejection of any application for insurance on my life, has been withheld or omitted. I agree that the statements and answers contained herein are, and shall be considered the basis of any insurance issued hereon.

I hereby expressly waive on behalf of myself and any person or persons who shall have or claim an interest in any policy issued hereon, all provisions of law forbidding any physician or other person who has prescribed for me or attended me, or may hereafter prescribe for me or attend me, from disclosing any knowledge or giving any information thereby acquired by him. I expressly authorize such physician or person to make such disclosures and to give such information.

Dated at Spokane, Wash., this 19th day of June, 1943.

Witness:

A. W. Cull,
Agent.

/s/ WM. WADE RICKETTS,
Applicant.
(Signature of Applicant in Full)

Mr. Young: Did you have any objection to this?

Mr. Erickson: Whose writing is this?

Mr. Young: I assume it is the doctor's [78]

(Testimony of Albert W. Cull.)

Mr. Erickson: I would like to ask a few questions about how it was filled out. I think Mr. Ricketts could answer that.

Mr. Young: All right, I'll put him on the stand.

Direct Examination
(Continued)

Q. Now, aside from this insurance inquiry made by you of Mr. Ricketts, what, if anything, else were you informed at any other times concerning his claim of citizenship?

A. Between these two policies some question come up with the Immigration authorities, and he told me that his ancestors were 'way back amongst the Mayflower, and why they should question him about being an American he couldn't see.

Q. I see; he discussed being put out about it?

A. Yes.

Q. Know anything else about his claimed citizenship?

A. Nothing, except he always claimed he was an American, and always supported the Red Cross and different drives I was on.

Cross-Examination

By Mr. Erickson:

Q. Now, at the time you took this application for life insurance in June, 1943, did he tell you at that time that he had any difficulty with the Immigration service? A. Not with the first, no.

Q. As a matter of fact, you filled out the application for insurance, didn't you? [79]

(Testimony of Albert W. Cull.)

A. Him answering the questions, as he said, yes.

Q. You just asked the questions and wrote down the answers yourself?

A. Wrote what he said, yes.

Q. Now, did you ask him specifically whether he was born in the United States, or whether a citizen of the United States?

A. If you are a citizen of the United States, it doesn't say where you was born.

Q. And he told you later on that he did have some difficulty with the Immigration authorities. Do you remember when that was?

A. It was between June of 1943 and July; no, between May, 1943, and June of 1944; I would judge around the first of the year some time.

Q. He did not discuss with you the merits of his case, his father going to Canada and taking out a homestead? You did not know about those details, did you?

A. Yes, I knew his father had homesteaded in Canada, yes.

Mr. Erickson: That's all.

(Whereupon, there being no further questions, the witness was excused.)

The Court: You've only introduced one policy.

Mr. Young: Yes, I have to further identify the other. [80]

ART STEWART

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Young:

Q. Mr. Stewart, your name has been dictated into the record. What is your business?

A. Contractor.

Q. And where do you live?

A. 4621 East 7th.

Q. How long have you been in the contracting business: A. Oh, about twelve years.

Q. What type of contracting do you follow?

A. Building.

Q. General building? A. Yes.

Q. How long have you known Mr. Ricketts, if you do know him, plaintiff in this case?

A. Since about September of 1944.

Q. And that is first that you knew him?

A. Yes.

Q. What, if any, claim of citizenship did he make at that time?

Mr. Erickson: To which we object, because it is after the institution of this action.

Mr. Young: I think that objection should be [81] sustained. I thought this witness had known him longer.

The Court: The objection will be sustained.

Direct Examination
(Continued)

Q. Do you know anything respecting his citizenship that would be of help to him, in your opinion?

(Testimony of Art Stewart.)

A. I know with all our talks he always claimed to be an American citizen.

The Court: Were all those talks after 1944?

A. Yes; I didn't know him until 1944.

The Court: The answer will be stricken from the record, and the answer disregarded. The court will instruct itself to disregard the answer.

(Whereupon, there being no further questions, the witness was excused.)

HAROLD GUBSER

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Young:

Q. How long have you known Mr. Ricketts, the plaintiff in this case?

A. Well, I think ever since he started in business here in the Empire Hotel, in the restaurant.

Q. What is your business and occupation?

A. I had a grocery store up until two months ago.

Q. And did you transact business with Mr. Ricketts? [82] A. Yes.

Q. That is the reason you remember him and know about him?

A. Yes, he traded there.

Q. When do you think, approximately, he started in business in the Empire restaurant?

(Testimony of Harold Gubser.)

A. That I can't say definitely. I think I started in in 1937, but I don't know for sure when he started. I think it must have been around 1940 or '41.

Q. And he was operating, then, the restaurant in the Empire Hotel building around 1940 or 1941, to the best of your recollection. Did you have occasion to discuss with him along about this time his claimed citizenship, or anything pertaining to his citizenship?

A. I don't remember discussing that with him at that time, right at first.

Q. I see; well, how soon after he started in the restaurant business do you remember discussing his claim of citizenship, to the best of your recollection?

A. I can't say definitely; I don't think it was for a year or two afterwards, though.

Q. Well, did something come up a year or two afterwards that was the occasion of him discussing his citizenship with you?

A. Yes, he had spoken of some trouble with the Immigration authorities. [83]

Q. I see; you think that occurred about a year or so after he was in business there?

A. As to the time, I couldn't say.

Q. What, if anything, did he say to you with respect to his citizenship, as to whether he was or was not an American citizen?

A. He told me that he thought he was, that he was born here, and thought he was a citizen.

Q. Did you discuss that matter with him on any other occasion?

(Testimony of Harold Gubser.)

A. Well, yes, several times afterwards.

Q. What, if anything, did you observe about his life in the community along the time he started in the restaurant business?

A. Well, his dealings with me were absolutely A-1.

Mr. Erickson: To which we object as immaterial.

The Court: The answer will be stricken as not responsive.

Direct Examination
(Continued)

Q. That wasn't the answer I hoped to receive. Did you observe whether or not he was interested in civic and political matters affecting the welfare of this country?

A. As far as I know I—no, I didn't know anything about it.

Q. I see; you didn't make any observation about it?

A. I didn't know anything other than our business dealings. [84]

Mr. Young: May may inquire.

Cross-Examination

By Mr. Erickson:

Q. You state that you had a conversation with Mr. Ricketts about being an alien, about him being a citizen, sometime, and you didn't fix the exact date. Can you fix the date of that?

A. No, I couldn't.

(Testimony of Harold Gubser.)

Q. Do you remember talking to some immigration inspectors that were out to see you?

A. Yes.

Q. Do you remember telling them you thought your conversation with Mr. Ricketts was in June or July, 1943, about Ricketts being a citizen?

A. I don't remember those dates either; that could be right.

Q. There isn't very much about it that you do recall at this time, Mr. Gubser?

A. Not of specific matters; the date part I can't remember.

Mr. Erickson: That's all.

Redirect Examination

By Mr. Young:

Q. Do you remember telling the Immigration authorities anything that Ricketts claimed with respect to his citizenship?

A. I think that was in the conversation.

Q. What did you tell them with respect to respent to Ricketts' claims of citizenship in the United States? [85]

A. As I recall it now, I told them that he had always professed in talking to me as being an American, and as I recall, I was questioned if that was, could have been, before a certain date too, but I did not know then which the date was; I've forgotten that already.

(Testimony of Harold Gubser.)

Recross-Examination

By Mr. Erickson:

Q. Well, did you tell, or did Mr. Ricketts tell you that he voted in Canada?

A. Yes, I believe that he did.

Mr. Erickson: That's all.

Redirect Examination

By Mr. Young:

Q. Isn't this what—state whether or not this is what Ricketts told you; that the basis of the claim, one of the bases of the claims of the Immigration authorities, was that he had lost his citizenship by reason of voting in Canada on an occasion?

Mr. Erickson: I think that's leading.

The Court: I'll sustain the objection on that ground, that it is leading. This is redirect of your own witness.

Mr. Young: Yes, I am trying to find out what he told.

Redirect Examination

(Continued)

By Mr. Young:

Q. Well, what did you tell the Immigration authorities that Ricketts told you about his voting in Canada? [86]

A. That I don't remember.

Q. Well, what did Ricketts tell you about his voting in Canada, that you told the Immigration authorities?

A. Well, we discussed it several times in talking about the trouble he had had, but as far as I re-

(Testimony of Harold Gubser.)

member, just what he said specifically on that point I don't remember.

Q. Well, do you know whether Ricketts told you anything about voting in Canada, or whether the Immigration authorities told you that he voted in Canada?

A. I can't answer that either.

Mr. Young: That's all.

(Whereupon, there being no further questions, the witness was excused.)

Mr. Young: Now, your Honor, I have some depositions from Canada of various witnesses. I has occurred to me that there may be one of several ways of handling them. I could offer them in evidence with the direction that they would ultimately be transcribed by the reporter into the statement of facts, or we can introduce them and read them question and answer.

The Court: I think it would be preferable to read them by question and answer, because there may be some objections that opposing counsel may wish to make, and we have to decide what is to be read and what kept out.

Mr. Young: All right. I move now for an order [87] publishing the deposition, and if you will turn over the envelope, I will indicate the deposition. At this time I ask the court for an order publishing the depositions of John Gardner McDougall and John Blair Lowrie, taken in this case on oral interrogatories.

The Court: Is there any objection to the publication of the depositions?

Mr. Erickson: No objection.

The Court: They may be published.

Mr. Young: I make the same motion with respect to the deposition of Forrest Dale Campbell.

The Court: It may be published.

Mr. Young: At this time I offer in evidence the deposition of witness John Gardner McDougall, taken before Ward H. Patterson, Commissioner, at his office in Calgary, Province of Alberta, on the 17th day of October, 1945, taken pursuant to Letters Rogatory issued out of this Court over the signature of Lloyd L. Black, Judge, dated September 15, 1945. The witness was sworn on oath, cautioned to tell the truth, and testified as follows:

The Court: Yes, I think we can omit the formal parts. There is no objection to that, is there?

Mr. Erickson: No.

Mr. Young: I assume they will be written into [88] the record?

The Court: Yes.

(Title of Cause.)

LETTERS ROGATORY

"The President of the United States, to any Judge or Tribunal, or Notary Public having jurisdiction of Civil Causes in the Province of Alberta, Dominion of Canada, Greeting:

Whereas, there is now pending before us a certain action in which William Wade Ricketts is plaintiff and The Attorney General of the United States

is defendant, and it has been made known to us that the testimony of the following witnesses, to-wit: Geo. W. Edmunds and John B. Lowrie of Calgary, William Craig and James McDougall of Cheadle, and F. D. Campbell and Mrs. Al Haga of Vulcan in the Province of Alberta, Dominion of Canada, are necessary in order that full justice be done in the premises;

We therefore request that, by the proper and usual process, you cause the said witnesses to appear before you, or before some person by you for that purpose appointed, on Monday, the 1st day of October, 1945, or succeeding days thereafter until all of said depositions have been taken, then and there to make answer on his oath or affirmation to the several oral interrogatories [89] and cross interrogatories, and that you cause his deposition to be committed to writing, inclosed and sealed and returned to us, together with these presents; and we shall be ready and willing to perform for you the same functions when required.

/s/ LLOYD L. BLACK,
Judge
/s/ A. A. LaFRAMBOISE,
Clerk.
P. O. Box 1493,
Spokane, Wash. 7."

Dated Sept. 15, 1945.

(Title of the cause)

LETTERS ROGATORY

"Evidence of John Gardner McDougall, a witness on behalf of the Plaintiff, taken before Ward H.

Patterson, Esq., Commissioner, at his office, 227a - 8th Avenue West, in the City of Calgary, in the Province of Alberta, Dominion of Canada, at the hour of 11.30 a. m. on the 17th day of October, A. D. 1945.

Present:

George W. Young, Esq.,
Attorney for the Plaintiff,
Harvey Erickson, Esq.,
Assistant United States District Attorney,
Attorney for the Defendant.
H. E. Cutler, Esq.,
Official Court Reporter.

Harvey E. Cutler, Official Court Reporter, took the [90] following oath:

You shall truly, faithfully and without partiality to any or either of the parties in this cause, take, write down, transcribe and engross all and every question which shall be exhibited or put to the witnesses and also the depositions of such witnesses produced before and examined by the Commissioner named in the Commission within written, as far forth as you are directed and employed by the Commissioner to take, write down, transcribe or engross the said questions and depositions. So help you God.

/s/ WARD H. PATTERSON,
Notary Public.
/s/ H. E. CUTLER,
Official Court Reporter.

Be It Remembered that on this 17th day of October, A. D. 1945, in the City of Calgary, Province of Alberta, Dominion of Canada, personally

appeared before me, Ward H. Patterson, Esq., a Notary Public in and for the Province of Alberta, residing at Calgary, John Gardner McDougall, of Cheadle, of the Province of Alberta, a witness for and on behalf of the Plaintiff. He was by me cautioned and sworn to tell the truth, the whole truth and nothing but the truth. The plaintiff was represented by his attorney, George W. Young, Esq.,; the Defendant was represented by Harvey Erickson, Esq., Assistant United States District Attorney, Attorney for the Defendant; that said witness gave testimony in the [91] above entitled cause pursuant to the attached Letters Rogatory and stipulation under which said Letters were issued, as follows:

JOHN GARDNER McDOUGALL

a witness called on behalf of the Plaintiff, in the action, having been first duly sworn, examined by Mr. Young, testified as follows:

Q. Your name is John Gardner McDougall?

A. Yes.

Q. Are you sometimes known as "James McDougall"?

A. No. "Red" mostly. I do not know how "James" got in.

Q. You are the James McDougall that is mentioned in the Letters Rogatory, so far as you know?

A. Yes.

Q. Is there anyone living at Cheadle named McDougall other than yourself?

(Deposition of John Gardner McDougall.)

A. No, I am the only one.

Q. And your residence is at Cheadle?

A. Yes.

Q. How old a man are you?

A. 35 years old.

Q. Are you acquainted with William Wade Rickett, the Plaintiff in this action?

A. Yes.

Q. Now how long have you lived at Cheadle?

A. I have lived there since 1935. [92]

Q. What is your business? A. Farming.

Q. Are you engaged in farming for yourself?

A. Yes, on a share basis.

Q. How many acres of land are you farming down there? A. 2330 acres.

Q. And you have it all on a share basis?

A. Yes.

Q. You own your own equipment, do you?

A. No, no.

Q. You also share that? A. Yes.

Q. How long have you been farming this land?

A. Three years I have been farming there.

Q. Are you a married man? A. Yes.

Q. What does your family consist of?

A. One son.

Q. How old is he?

A. Rising two, he will be two years in January.

Q. You were recently married?

A. Yes.

Q. Now, when did you first meet William Wade Ricketts?

A. In 1934, the winter of 1934.

(Deposition of John Gardner McDougall.)

Q. What were the circumstances of that meeting? [93]

A. We were both working on a ranch down here at Dalemead.

Q. Did you occupy living quarters together?

A. Yes, we occupied living quarters for three months together.

Q. And following that first meeting did you see him or associate with him?

A. We were together for three months, every day working side by side.

Q. And then following that?

A. Following that then I met him off and on, for, oh, two years after that.

Q. Then when was the last time you met him?

A. Last summer when he was back up to Calgary here.

Q. During the time of your acquaintance with him, what, if any, citizenship did he claim?

A. He always claimed American and he said he was born there, he always claimed that.

Q. When you use the term "American" you mean citizenship in the United States?

A. Yes, that is what I mean.

Q. When was the first time so far as you can recall when you had occasion or when you discussed his citizenship with him? And by "him" I mean "William Wade Ricketts," the Plaintiff in this action?

A. Well, that was in the first time I met him in 1934 when [95] we were working together. We

(Deposition of John Gardner McDougall.)

were talking what our nationalities was and I told him I was Scotch and he claimed to be an American then and we used to get into arguments back and forward, as you do, discussing the border and that.

Q. Did you ever hear him discuss Canadian politics or British politics?

A. No, no, he did not take any active part in that, he may have talked about the Government we had here, you know, like you do, we talked of that but he never actually got into any argument over it. It did not seem to worry him one way or the other.

Q. So far as you were able to observe did he ever participate in Provincial or local politics?

A. Not to my knowledge has he ever done.

Q. Did he ever, so far as you know, or rather state whether or not he ever advocated the election, or advocated the cause of any one seeking office in Canada? A. No, he never did.

Q. Or in the Province of Alberta?

A. No.

Q. During the time you knew him what was his occupation?

A. He was a farm and ranch hand when I first knew him and then after that he had a restaurant in Calgary here for a while. [95]

Q. He operated a restaurant in Calgary for a time?

A. Yes, on 17th Avenue West here.

Mr. Young: You may inquire.

(Deposition of John Gardner McDougall.)

Cross-Examination

By Mr. Erickson:

Q. Mr. McDougall, you first became acquainted with him when you were working together on the same ranch as hired—— A. As hired help.

Q. As hired help? A. Yes.

Q. And he was not married at that time and you were not married? A. No.

Q. You both lived together in the same bunkhouse? A. In the same bunkhouse.

Q. Did he discuss with you the question of citizenship, did he bring that up?

A. Well, we were talking, you know, as we do, what our nationalities was and I said I was Scotch and he said he was an American, his folks were born there and he was born there and he was an American.

Q. Did he say he was born in the United States? And that he was still an American citizen?

A. He said he was born in the United States and he said he was American, he said he had never changed his papers.

Q. He said he had never taken out papers in Canada? [96]

A. That is what he told me.

Q. Did he say that his father had taken out papers?

A. He never mentioned his father taking out papers to me at all.

Q. Did he ever mention his father at all?

A. Well, he said his father and mother were

(Deposition of John Gardner McDougall.)

born in the States, that is all he ever mentioned his friends' names.

Q. Did he say that his father and mother were of any different citizenship than he was?

A. No, he never, I never heard him say that at all.

Q. Did he ever mention any other brother or member of the family?

A. No, he never mentioned any member of his family to me.

Q. So far as you know his family consisted of himself and his parents?

A. To me, so far as my knowledge went.

Q. Did they have any election or political campaign on at the time you were living together with him? A. No, never did.

Q. Do you vote in Canada?

A. Yes, I do.

Q. You are a Canadian citizen?

A. I am a British subject, and a Canadian citizen, yes.

Q. And did you discuss with him which party you advocated or adhered to up here? [97]

A. No, we never came to an election up here at that time, and we never got into that, as to what my form was in politics.

Q. Did you advocate either party you believed in or its principles?

A. Yes, we used to argue back and forward and he would not take any part in it, he never said what he thought one way or the other.

(Deposition of John Gardner McDougall.)

Q. What party did he think was the best up here, if he made any statement?

A. Well, there was that time, he was in there, there was the Conservatives in about that time and they were having men out working for next to nothing and we was pretty well, working for our board at that time, in 1934, it was a pretty tough time.

Q. Yes.

A. And that is when we used to talk about one thing and another.

Q. Did he believe that the Conservative party was the best party?

A. No, he did not, he did not figure that one party was much more than the other, he did not think any of the old line parties, he thought they were much alike.

Q. Did he discuss the hard times and the relief set-up you had here in Canada? [98]

A. Pardon?

Q. Did he discuss the relief set-up you had here in Canada?

A. Well, he said he did not think it was as good as the set-up they had in the States, that is all he claimed to me.

Q. They were having down there——

A. Well, you had some kind——

Q. The W.P.A.?

A. The W.P.A. or something of that kind down in the States, and we had relief in this country.

Q. What did you call your program in Canada?

A. Just relief.

(Deposition of John Gardner McDougall.)

Q. And he thought that the W.P.A. program in the United States was superior?

A. Was superior.

Q. To the relief program which you had in Canada? A. Yes.

Q. Did he tell you how long he had lived in Canada? A. No, never did.

Q. Did he ever state to you that he intended to go back to the United States?

A. No, that never came up at all.

Q. Did he ever discuss with you that he might stay in Canada? A. No.

Q. And become a Canadian? [99]

A. No, that was never brought up at all.

Q. Did he state to you what kind of work he was going to follow?

A. Well, at that time we both followed the farming trade and we did not see much difference, but I believe he was interested in the restaurant business and after a few years he did start a small restaurant in Calgary here.

Q. Well, during the time you lived together with him, for the three months, and you talked with him every day? A. Yes, we talked.

Q. And you discussed this citizenship question many times? A. Yes.

Q. Do you recall that he said outright that he was a citizen of the United States?

A. Yes, he claimed to be a citizen of the United States. We used to razz him and call him a "Yankee" and one thing and another, and "Scotchman,"

(Deposition of John Gardner McDougall.)

back and forward, and he claimed he was an American.

Q. And you said you met him about two years later, where did you meet him two years later?

A. Two years later, if I recall rightly, it was in the restaurant here in Calgary, I might be a year out, I would not swear what the exact date was at all.

Q. But you were in his restaurant?

A. Yes, I have been in his restaurant. [100]

Q. Did you discuss any citizenship at that time?

A. No, there was nothing discussed then at all.

Q. And you did not see him then until this summer?

A. I did not see him until last summer.

Q. That was the summer of 1944?

A. 1944, I guess, yes, 1944; this is 1945 and it was last summer he was up.

Q. Did he discuss with you at that time any trouble that he was having with the Immigration authorities?

A. Yes, he did. He told me that he was having trouble and that is why he was up here.

Q. And he asked you at that time if you would be a witness for him?

A. No, he never asked me at that time if I would be a witness. The first thing I knew about being a witness was when I received the letter from Mr. Young.

Q. What trouble did he tell you he had with the Immigration authorities?

(Deposition of John Gardner McDougall.)

A. Well, he told me that he had got caught and put out because they figured he was a Canadian and he was waiting here and sending to Ottawa, he was waiting here quite a long time getting papers back from Ottawa to claim his American citizenship, because they were trying to make out he was not an American.

Q. Did he discuss any of the facts with you then? [101] A. No.

Q. About his father moving to Canada?

A. He said he was having trouble finding his dad's certificate or something like that down in Ottawa.

Q. His father's birth certificate?

A. I think that is what it was, or his own birth certificate or something in Ottawa, I did not pay much attention to him talking that day.

Q. That is the first time you know of that he ever mentioned his father?

A. No, he had mentioned his father being born in the States and his mother that other time and that is all, and then he mentioned it again here.

Q. Did you ever know anything about his younger brother?

A. No, I never knew there were any other of the family other than him.

Q. He never mentioned any other members of his family?

A. No, he never mentioned any other member of the family.

Q. Well, he did say to you that he was waiting to get back into the States in the summer of 1944?

(Deposition of John Gardner McDougall.)

A. Yes, he said that that was why he was up there, he had closed his restaurant and was waiting to get back down there on that account.

Q. Did he state what he was going to do, what he intended, what he was going to do down there after claiming his [102] residence?

A. What do you mean?

Q. Or citizenship in the United States?

A. What do you mean by that?

Q. I mean did he state that he was going to the United States for the purposes of being a visitor or a permanent resident?

A. No, he wanted to be a permanent resident of the United States when he went back.

Q. He said then that he was through with Canada? A. Yes.

Q. So far as residing here was concerned?

A. Yes, that is what he said; he strongly discussed that, that he would not come back to Canada at all.

Q. Did he give any reason?

A. Well, he said it was a much better country, he always figured that, and better times down there and he said he was always an American and he was going back there because he liked it there.

Q. Did he tell you that he had ever voted or held any office either in the municipal or city government up here? A. No.

Q. At any time or a school district?

A. No, he never mentioned that at all to me.

Q. Did he discuss with you any of the reasons

(Deposition of John Gardner McDougall.)

why the Immigration [103] authorities would not permit him to come back into the United States?

A. Well, he did discuss about that one time, about one time he went over there some way without them knowing, he had not declared himself and that is why they caught up with him or something, according to him.

Q. And that is the only reason?

A. That is the only reason he gave me.

Mr. Erickson: That is all.

Mr. Young: Will you stipulate that the signature of Mr. McDougall may be waived, we do not need to wait for that.

Mr. Erickson: Yes, I will stipulate that the signature of Mr. McDougall may be waived and I think I also should probably stipulate in each deposition that the objections may be made at the time of the trial, to each interrogatory.

Mr. Young: Except as to the form of question.

Mr. Erickson: Except as to the form of question.

Mr. Young: It is stipulated between counsel representing the respective parties that the depositions herein taken of the witness herein may be mailed by the Notary Public taking it, directly to A. A. LaFramboise, Clerk of the United States District Court, Eastern District of Washington, Spokane, Washington. [104]

(Deposition of John Gardner McDougall.)

[Title of Cause.]

Province of Alberta,
City of Calgary—

I Hereby Certify that on the 17th day of October, A.D. 1945, before me, a Notary Public in and for the Province of Alberta, at my office at 227a-8th Avenue West, in the City of Calgary, Province of Alberta, Dominion of Canada, personally appeared pursuant to the stipulation and annexed Letters Rogatory, a witness, John Gardner McDougall, a witness named in the letters Rogatory, George W. Young, Esq., appeared for the Plaintiff, and Harvey Erickson, Esq., appeared for the Defendant, and the said John Gardner McDougall, being by me first duly cautioned and sworn to testify the whole truth, and being carefully examined, deposed and said as in the foregoing annexed deposition set out.

I Further Certify that the said deposition was begun on the 17th day of October, A.D. 1945, and was completed on the said day.

I Further Certify that the said deposition was then reduced to typewriting by Harvey E. Cutler, Esq., an Official Court Reporter, who was first sworn by me in the foregoing oath; and that the same has been retained by me for the purpose of sealing up and directing the same to the Clerk of the Court as required by law. [105]

I Further Certify that I am not of Counsel or

(Deposition of John Gardner McDougall.)

Attorney to either of the parties, nor am I interested in the event of the cause.

I Further Certify that the fee for taking said deposition has been paid to me by the Plaintiff and that the same is just and reasonable.

Witnesseth my hand and official seal at the City of Calgary, in the Province of Alberta, Dominion of Canada, this 17th day of October, A.D. 1945.

[Notary Seal]

/s/ WARD H. PATTERSON,
Notary Public.

CERTIFICATE OF REPORTER

I, Harvey E. Cutler, Official Court Reporter of the City of Calgary, Province of Alberta, Dominion of Canada, do hereby certify that I am the reporter referred to in the certificate immediately above; that I was sworn under the oath set forth in the certificate herein above; that I did attend and take of the deposition of the witness John Gardner McDougall, which deposition was taken after the witness was first cautioned and sworn on oath to tell the truth, the whole truth and nothing but the truth, in the above entitled cause; that I took his testimony as it was given in answer to oral interrogatories propounded to him, in shorthand and reduced the same to typewriting as appears herein. [106]

(Deposition of John Gardner McDougall.)

Dated at the City of Calgary, in the Province of Alberta, this 17th day of October, A.D. 1945.

/s/ H. E. CUTLER,
Official Court Reporter.

The Court: I don't recall whether there has been any testimony of the present marital status of the defendant, or rather the plaintiff.

Mr. Young: No, there hasn't been. I think we can stipulate on that.

The Court: I don't think it is material, perhaps.

Mr. Young: I would like at this time to offer the deposition of John Blair Lowrie under the same circumstances.

(Title of the Cause)

Letters Rogatory

Evidence of John Blair Lowrie, Esq., a witness on behalf of the Plaintiff, taken before Ward H. Patterson, Esq., Commissioner, at his office, 227a 8th Avenue West, in the City of Calgary, in the Province of Alberta, Dominion of Canada, at the hour of 2:30 p.m. on the 16th day of October, A.D. 1945.

Present:

George W. Young, Esq., Attorney for the Plaintiff.

Harvey Erickson, Esq., Assistant United States District Attorney, Attorney for the Defendant.

H. E. Cutler, Esq., Official Court Reporter.

HARVEY E. CUTLER,

Official Court Reporter, took the following oath:

You shall truly, faithfully and without partiality to any or either of the parties in this cause, take, write down, transcribe and engross all and every question which shall be exhibited or put to the witnesses and also the depositions of such witnesses produced before and examined by the Commissioner named in the Commission within written, as far forth as you are directed and employed by the Commissioner to take, write down, transcribe or engross the said questions and depositions. So help you God.

/s/ H. E. CUTLER,
Official Court Reporter.

/s/ WARD H. PATTERSON,
Notary Public.

Be It Remembered that on this 16th day of October, A.D. 1945, in the City of Calgary, Province of Alberta, Dominion of Canada, personally appeared before me, Ward H. Patterson, Esq., a Notary Public in and for the Province of Alberta, residing at Calgary, John Blair Lowrie, of Calgary, of the Province of Alberta, a witness for and on behalf of the Plaintiff. He was by me cautioned and sworn to tell the truth, the whole truth and nothing but the truth. The Plaintiff was represented by his attorney, George W. Young, Esq., the Defendant was represented by Harvey Erickson, Esq., Assistant United States District Attorney, Attorney for the Defendant; that said witness gave

testimony in the above entitled cause pursuant to the attached Letters Rogatory and stipulation under which said Letters were issued, as follows:

JOHN BLAIR LOWRIE,

a witness called on behalf of the Plaintiff in the action, having been first duly sworn; examined by Mr. Young, testified as follows:

Q. Your name is John Blair Lowrie?

A. Right.

Q. You will answer audibly so that the reporter will get your answers? A. Yes.

Q. Are you sometimes known as John B. Lowrie? A. Yes.

Q. And are you the John B. Lowrie that is mentioned in the Letters Rogatory that have been submitted to you? A. Yes.

Q. Where do you reside, Mr. Lowrie?

A. At Calgary, Alberta. Do you want my full address? [109]

Q. No, you reside at Calgary, Alberta?

A. Yes.

Q. That is sufficient. Now how long have you resided in Calgary?

A. Well nearly 40 years, 39 years, I was born here.

Q. What business are you engaged in?

A. Taxi and livery business, livery business.

Q. You are a married man, are you?

A. Yes.

Q. Have you a family? A. No.

(Deposition of John Blair Lowrie.)

Q. Will you tell me how long you have been in the taxi business here?

A. Approximately 15 years.

Q. You own a fleet of taxi-cabs, do you?

A. Well, I am a partner in them.

Q. Did you or do you know William Wade Ricketts, the plaintiff in this action?

A. Yes, I do.

Q. How long have you known him?

A. Approximately 10 years, since 1934.

Q. You met him in 1934 for the first time as you recall? A. Yes.

Q. During that time did you become acquainted with him, we will say to the extent of becoming friends? [110] A. Yes.

Q. What was he doing in Calgary, if he was in Calgary?

A. Well he worked around the district here, he also ran a restaurant or a lunch counter up in the West end of the city.

Q. During the time of your acquaintance with him did you have occasion to discuss with him his nationality or claimed citizenship?

A. Well——

Q. You can answer that "Yes" or "No"?

A. Yes.

Q. What, if any, representations did William Wade Ricketts make with respect to his citizenship?

A. Well he always claimed to be an American. He was born in the United States and amongst the

(Deposition of John Blair Lowrie.)

boys around he was always, claimed to be an American.

Mr. Erickson: Now, I move that that last part of the answer be stricken "amongst the boys around he was always, claimed to be an American."

The Court: I think that part should be stricken; it would appear to be hearsay.

Q. Have you heard him on more than one occasion profess or claim American citizenship or citizenship in the United States?

A. Yes, I have. [111]

Q. Do you know whether or not he was generally accepted to be or considered as an American citizen, by the people in the local community here in Calgary?

Mr. Erickson: I am going to object to that question as hearsay.

The Court: I think an objection will be sustained. It would be immaterial.

Q. State whether or not that was the general reputation which he bore with regard to his status as to citizenship here in this community?

Mr. Erickson: I object to that.

The Court: Sustained.

Q. Did you ever observe him engaging in any political activities peculiar to the Province of Alberta, or the City of Calgary? A. No.

Mr. Young: You may inquire.

(Deposition of John Blair Lowrie.)

Cross-Examination

By Mr. Erickson:

Q. How did you become acquainted with Ricketts in 1934?

A. Well one of the boys that worked in the office went out harvesting out at Cheadle, he was working around that district and he came in and we got acquainted here in the city and he always came around and he sat around the hotel there, you know; things were kind of tough at that time. [112]

Q. Has he ever worked for you? A. No.

Q. Did he stay at the hotel in which you had your office?

A. Well, he stayed around there, different hotels. He stayed at the Empire, that is next door, and I cannot say for sure whether he stayed in the Yale or not. I do not remember really. It is quite a while ago.

Q. Did you belong to the same Lodges or Societies as he belonged to? A. No.

Q. Was your acquaintance mainly business or was it social?

A. How—a little of both I guess, he used to drive with us and also be friends with him.

Q. He was not working for the Cab Company?

A. No, no.

Q. You said "drive" with you?

A. Well we used to drive him, I should say.

Q. He employed your cab to go about?

A. That is right.

Q. On his business at times? A. Yes.

(Deposition of John Blair Lowrie.)

Q. You say during that time he was in the restaurant business?

A. Yes, he had,—I would not say it was 1930 or 1934, but in those years you know he had a restaurant up there. [113]

Q. Did he own the restaurant business?

A. As far as I know.

Q. Did he have employees or was it just a small restaurant that he operated himself?

A. I think he had employees. I think he had a girl or two, I would not say for sure on that.

Q. Were you a patron in the restaurant?

A. No, just to have a cup of coffee, I never ate there. I always ate at home.

Q. Well how often would you see Mr. Ricketts, just give us a rough idea? A. Well——

Q. How many times?

A. Well if he was down town or something like that he would drop around and different times when we were out in the West end we would drop in there and have coffee.

Q. Well he has never visited in your home or you visited in his home?

A. Well not at that time, I was not married then.

Q. Has he ever visited in your home?

A. Yes, he has since I got married, in the last three years.

Q. Did you visit in his home? A. No.

Q. That was within the last three years?

A. Yes. [114]

Q. Did he ever discuss this case with you?

(Deposition of John Blair Lowrie.)

A. No.

Q. You say that he told you he was an American citizen or a citizen of the United States?

A. Right.

Q. And he told you that he was born in the United States?

A. Born in the United States, yes.

Q. Did he tell you anything about his family, his father or mother? A. No.

Q. Or did he tell you how he came to Canada?

A. No.

Q. You never asked him?

A. I never asked him, no.

Q. How he happened to come to Canada?

A. No.

Q. Well did he say he was going back to the United States or going to stay in Canada?

A. No, beg pardon?

Q. Did he tell you that he was going to stay in Canada or go back to the United States or what?

A. Well he always claimed to be an American and he did not claim he was going to stay in Canada and he did not say he was going back to the States.

Q. Did he tell you that he had any difficulties with the [115] Immigration officers? A. No.

Q. He never discussed any of his problems with the Immigration authorities with you?

A. No.

Q. What was the occasion, how did he happen to tell you that he was a citizen of the United States?

(Deposition of John Blair Lowrie.)

A. Well, he claimed to be an American, that is I figured he was a citizen.

Q. No, but I mean, upon what occasion or what caused him to say that?

A. Well, he just claimed he was an American.

Q. Were you discussing citizenship with him at the time or something of that nature, was that why he brought up the subject?

A. Well, gosh, I would not know.

Q. You do not recall the circumstances?

A. I do not recall it.

Q. Did he discuss that with other people besides yourself, that you know of, or just to you?

A. No.

Q. You and he were the only ones present when that was discussed, that he was a citizen of the United States?

A. Well, is this over the years, is this back in 1934?

Q. Well, at any time it was discussed, that he was a citizen [116] of the United States, were you and he alone together or were other people present?

Mr. Young: You can reflect on that if you wish.

A. Well, he used to claim it amongst the boys, you know, that he was an American and he was considered an American.

Q. Well who do you mean by "the boys"?

A. Well different chaps around, you know.

Q. Around the Cab Company?

A. Yes, we considered him, the way he talked, that he was an American.

(Deposition of John Blair Lowrie.)

Q. But you did hear him make that statement when others were present besides yourself?

A. Yes.

Q. There were other people present?

A. Yes.

Q. Do you recall who any of those were?

A. No.

Q. Just employees of the Company?

A. Yes.

Q. Well did he ever discuss any Provincial politics with you? A. No.

Q. At the time of elections? A. No.

Q. Did he ever discuss any local city politics?

A. None at all.

Q. Anything about the administration of the civic government of Calgary?

A. No, he worked around on the outskirts here, he was not always in town.

Q. Did he ever discuss any school district affairs with you? A. No.

Q. Or drainage affairs or any municipal affairs?

A. No.

Q. Did he ever discuss any political affairs in the United States, at the time of any Presidential election or anything like that? A. No.

Q. He never discussed, oh, President Roosevelt, whether he would be re-elected or not, or Wendell Wilkie, or any other figures that were running for office down there, like Governor Dewey?

A. I do not recall.

Q. All you remember then, is that he said he

(Deposition of John Blair Lowrie.)

was an American citizen or a citizen of the United States, and you do not recall that he said anything more than that about his citizenship?

A. No.

Q. When did you see Mr. Ricketts the last time, do you recall? [118]

A. Let me see, it must be about a year or so ago, about a year ago.

Q. That was up in Calgary here?

A. In Calgary here, yes.

Q. And he told you at that time that he had a case pending, did he, against the Immigration authorities, or the Attorney General, seeking a declaration of his citizenship?

A. Yes.

Q. And he discussed with you whether or not you would be willing to be a witness in the case?

A. No.

Q. He just told you that he had a case pending?

A. He said he had a case pending.

Q. Well did he ever tell you that he had held any school district post or any municipal post up in Canada at any time? A. None.

Mr. Erickson: I believe that is all.

Re-examination

By Mr. Young:

Q. When was the first time you knew that you were to be interrogated in connection with Ricketts', with William Wade Ricketts' case against the Attorney General?

(Deposition of John Blair Lowrie.)

A. Oh it must have been, I forget, it was last Fall or last January, somewhere in the winter, I believe it was, that [119] I got a letter from you asking me for an affidavit.

Q. That was the first time that you knew that you would be called? A. That is right.

Q. To give testimony? A. Yes.

Q. And in response to that letter you replied stating the substance of the testimony which you have now given, is that correct? A. Yes.

Mr. Young: That is all.

Recross-Examination

By Mr. Erickson:

Q. Did you know any other member of Mr. Ricketts' family besides himself?

A. I met his wife.

Q. Did you ever meet his father and mother?

A. No.

Q. Did he have any brothers and sisters?

A. He had a brother in the Air Force, I believe, I met him at the C. P. R. Depot.

Q. Was he in the Canadian Air Force?

A. Yes, he was.

Q. Do you know whether or not he was a citizen of the United States or Canada?

Mr. Young: I am going to object to that question. [120]

The Court: I think it is improper cross-examination, and will be sustained.

Q. Was he older than William Wade Ricketts or younger or do you know?

(Deposition of John Blair Lowrie.)

Mr. Young: I am going to object to that also.

The Court: Both of them will be stricken.

Q. If he was in the Air Force he would be probably younger, would he not?

Mr. Young: That is likewise immaterial, and I will object to it.

The Court: Objection sustained.

Q. You say that he never discussed any member of his family with you? A. No.

Mr. Erickson: I think that is all.

Mr. Young: Will you stipulate that the signature of Mr. Lowrie may be waived, we do not need to wait for that.

Mr. Erickson: Yes, I will stipulate that the signature of Mr. Lowrie may be waived and I think I also should probably stipulate in each deposition that the objections may be made at the time of trial, to each interrogatory.

Mr. Young: Except as to the form of question.

Mr. Erickson: Except as to the form of question.

Mr. Young: And it is stipulated between counsel representing the respective parties that the depositions herein taken of the witness herein may be mailed by the Notary Public taking it, directly to A. A. LaFramboise, Clerk of the United States District Court, Eastern District of Washington, Spokane, Washington.

(Deposition of John Blair Lowrie.)

(Title of the Cause)

Province of Alberta,
City of Calgary.

I Hereby Certify that on the 16th day of October, A.D. 1945, before me, a Notary Public in and for the Province of Alberta, at my office at 227a 8th Avenue West, in the City of Calgary, Province of Alberta, Dominion of Canada, personally appeared pursuant to the stipulation and annexed Letters Rogatory, a witness John Blair Lowrie, a witness named in the Letters Rogatory. George W. Young, Esq., appeared for the Plaintiff and Harvey Erickson, Esq., appeared for the Defendant, and the said John Blair Lowrie, being by me first duly cautioned and sworn to testify the whole truth, and being carefully examined, deposed and said as in the foregoing annexed deposition set out.

I Further Certify that the said deposition was begun on the 16th day of October, A.D. 1945, and was [122] completed on the said day.

I Further Certify that the said deposition was then reduced to typewriting by Harvey E. Cutler, Esq., an Official Court Reporter, who was first sworn by me in the foregoing oath; and that the same has been retained by me for the purpose of sealing up and directing the same to the Clerk of the Court as required by law.

I Further Certify that I am not of Counsel or Attorney to either of the parties, nor am I interested in the event of the cause.

(Deposition of John Blair Lowrie.)

I Further Certify that the fee for taking said deposition has been paid to me by the Plaintiff and that the same is just and reasonable.

Witnesseth my hand and official seal at the City of Calgary, in the Province of Alberta, Dominion of Canada, this 17th day of October, A.D. 1945.

[Notary Seal] /s/ WARD H. PATTERSON,
Notary Public.

CERTIFICATE OF REPORTER

I, Harvey E. Cutler, Official Court Reporter, of the City of Calgary, Province of Alberta, Dominion of Canada, do hereby certify that I am the reporter referred to in the certificate immediately above; that I was sworn under the oath set forth in the certificate herein above; that I did attend and take the deposition of the witness [123] John Blair Lowrie, which deposition was taken after the witness was first cautioned and sworn on oath to tell the truth, the whole truth and nothing but the truth, in the above entitled cause; that I took his testimony as it was given in answer to oral interrogatories propounded to him, in shorthand and reduced the same to typewriting as appears herein.

Dated at the City of Calgary, in the Province of Alberta, this 17th day of October, A.D. 1945.

/s/ H. E. CUTLER,
Official Court Reporter.

(Short recess.)

(All parties present as before, and the trial was resumed.)

Mr. Young: I desire to offer the deposition of Forrest Dale Campbell, taken pursuant to Letters Rogatory.

(Title of the Cause)

Letters Rogatory

Evidence of Forrest Dale Campbell, Esq., a witness on behalf of the Plaintiff, taken before Herbert J. Maber, Esq., Commissioner, at his office, in the Town of Vulcan, in the Province of Alberta, Dominion of Canada, at the hour of 4:30 p.m. on the 17th day of October, A.D. 1945. [124]

Present:

George W. Young, Esq., Attorney for the Plaintiff.

Harvey Erickson, Esq., Assistant United States District Attorney, Attorney for the Defendant.

Myrtle Carlson, Stenographer.

Be It Remembered that on this 17th day of October, A.D. 1945, at the Town of Vulcan, in the Province of Alberta, Dominion of Canada, personally appeared before me, Herbert J. Maber, Barrister at Law and a Notary Public in and for the Province of Alberta, residing at Vulcan, Forrest Dale Campbell, of Vulcan, aforesaid, a witness for and on behalf of the Plaintiff. He was duly sworn by me to tell the truth, the whole truth and nothing but the truth. The Plaintiff was represented by his attorney, George W. Young, Esq., the defendant was rep-

resented by Harvey Erickson, Esq., Assistant United States District Attorney, Attorney for the Defendant. That said witness gave testimony in the above entitled cause pursuant to the attached Letters Rogatory and stipulation under which said Letters were issued, as follows:

FORREST DALE CAMPBELL

a witness called on behalf of the Plaintiff in the action, having been first duly sworn; [125] examined by Mr. Young, testified as follows:

Direct Examination

By Mr. Young:

Q. State your name.

A. Forrest Dale Campbell.

Q. Are you also known as F. D. Campbell?

A. Yes.

Q. And so far as you know are you the only F. D. Campbell in Vulcan, Alberta?

A. Yes, I am the only one I know of.

Q. How old are you? A. 49.

Q. Are you a married man? A. Yes.

Q. How long have you lived at Vulcan?

A. 37 years.

Q. Do you know William Wade Ricketts, the Plaintiff in this case? A. Yes.

Q. When did you first become acquainted with William Wade Ricketts?

A. About 1928 or 1929, as far as I can remember.

(Deposition of Forrest Dale Campbell.)

Q. What was the circumstances of your becoming acquainted with him?

A. He come in there from Saskatchewan to work on a farm, a [126] neighbor to me.

Q. Did you see him from time to time following your first acquaintance?

A. I saw him every week or so, yes.

Q. Over what period of time?

A. Oh, for four or five years he was around there.

Q. Did you have occasion to discuss with him his citizenship? You can answer that yes or no.

A. Yes. We talked about it one time. He said he was an American citizen, born in the States. He said he was born in the States.

Q. State whether or not William Wade Ricketts claimed to be a citizen of the United States during all the time that you have known him.

A. Yes, all the time I knew him he claimed to be a citizen of the United States.

Q. State whether or not during the time that you have known him, he participated in any Provincial or Municipal politics peculiar to the Province of Alberta? A. No, nothing at all.

Q. How frequently since you first met him have you seen him or had occasion to converse with him, just give me the conversations generally.

A. I knew him and was talking to him quite frequently over four or five years, and then last fall I saw him in [127] Calgary for just a few minutes.

Q. What, if anything, did he say to you about his citizenship, or claim of citizenship last fall when you saw him in Calgary?

(Deposition of Forrest Dale Campbell.)

A. He never mentioned it at all.

Q. When was the first time that you knew that you were to be a witness in his behalf, or would be asked any questions concerning his citizenship?

A. I do not know just—last winter I believe, some time in the winter.

Q. How did that come to you?

A. I got a form to fill out and send down, but I do not know just when it was. I did not pay much attention to it.

Q. Was it a form contained in a letter written from my office? A. Yes.

Mr. Young: You may inquire.

Cross-Examination

By Mr. Harvey Erickson:

Q. Did you say that you discussed the citizenship with him once when he came from Saskatchewan?

A. Oh, as far as I know. I never paid much attention to it, just once so far as I know.

Q. Were you and he there alone when you had this discussion with him, or were others present?

A. I was alone as far as I remember.

Q. Do you remember where that was?

A. Yes.

Q. Where was it?

A. M. A. Jansen, where he worked.

Q. And how did that discussion come up, did you bring it up or did he voluntarily bring it up?

(Deposition of Forrest Dale Campbell.)

A. Well, I cannot say about that, that has been a long while ago.

Q. Did he say that he was a citizen of the United States or that he was born in the United States?

A. He claimed to be a citizen of the United States, born there.

Q. Did he ever tell you that he voted in Saskatchewan? A. Never.

Q. Did he ever tell you that he held any School District Office in Saskatchewan? A. No.

Q. Did he ever tell you anything about the citizenship of his father and mother?

A. Yes, he said that his dad was born in the States.

Q. Did he say anything about his father being an American citizen?

A. He said he was an American citizen as far as I can remember. [129]

Q. Did he ever say that his father was naturalized in Canada? A. No, not to me.

Q. Did he ever say anything about his mother coming to Canada, or being naturalized in Canada?

A. No, he never mentioned his mother to me.

Q. Did he ever say anything about any brothers or sisters? A. No.

Q. Did he ever discuss Canadian politics with you? A. No, he never did.

Q. Did he ever discuss politics of the United States?

A. No, he never done that either.

Q. Did he tell you that he intended to live in

(Deposition of Forrest Dale Campbell.)

Canada, or that he intended to go back to the United States? A. Never said.

Q. Did he ever tell you about any trouble that he had with the Immigration authorities?

A. No.

Q. Well, did he ever say anything to you as to when he intended to go back across the border?

A. No, he never did.

Q. Did he ever tell you how he happened to be in Canada in 1928 or 1929?

A. No, he never did.

Q. He was over 21 years of age at that time, was he not? A. Oh, yes. [130]

Q. Did he tell you that he had been back to the United States since he came to Canada?

A. No, not before that.

Q. Did he ever tell you how old he was when he came to Canada? A. No.

Q. Did he ever tell you that he thought business perhaps was better in the United States than in Canada?

A. No, I do not think that he ever did.

Q. Did he give any reason to you for wanting to claim an American citizenship? A. No.

Mr. Erickson: I believe that is all.

[Notary Seal]

/s/ HERBERT J. MABER,
The Commissioner.

(Deposition of Forrest Dale Campbell.)

(Title of Cause.)

Province of Alberta—

I Hereby Certify that on the 17th day of October, A.D. 1945, before me, Herbert J. Maber, Barrister at Law and a Notary Public in and for the Province of Alberta, at my office in the Town of Vulcan, in the Province of Alberta, Dominion of Canada, personally appeared pursuant to the stipulation and annexed Letters Rogatory, Forrest Dale Campbell, a witness named in the Letters Rogatory. George W. Young, Esq., appeared for [131] the Plaintiff and Harvey Erickson, Esq., appeared for the Defendant, and the said Forrest Dale Campbell, being by me first duly sworn to testify the whole truth and nothing but the truth, and being carefully examined, deposed and said as in the foregoing annexed deposition set out.

I Further Certify that the said deposition was begun on the 17th day of October, A.D. 1945, and was completed on the said day.

It Was Agreed between the attorneys that the signature of Mr. Forrest Dale Campbell to his deposition be waived, and stipulated that objections to each deposition be made at the time of trial, except as to the form of question,

And It Was further stipulated between counsel representing the respective parties that the depositions herein taken of the witness be mailed by the Commissioner directly to A. A. LaFramboise,

(Deposition of Forrest Dale Campbell.)
Clerk of the United States District Court, Eastern District of Washington, Spokane, Washington.

I Further Certify that the said deposition was then reduced to typewriting by Myrtle Carlson, the Stenographer, appointed by me, and that the same has been retained by me for the purpose of sealing up and directing the same to the Clerk of the Court as required by [132] law.

I Further Certify that I am not of Counsel or Attorney to either of the parties, nor am I interested in the event of the cause.

I Further Certify that the fee for taking said deposition has been paid to me by the Plaintiff and that the same is just and reasonable.

Witnesseth my hand and official seal at the Town of Vulcan, in the Province of Alberta, Dominion of Canada, this 17th day of October, A.D. 1945.

[Notary Seal] /s/ HERBERT J. MABER,
Commissioner.

CERTIFICATE OF STENOGRAPHER

I, Myrtle Carlson, of the Town of Vulcan, in the Province of Alberta, Dominion of Canada, Stenographer, do hereby make oath and certify that I am the Stenographer referred to in the Certificate immediately above; that I did attend and truly take the deposition of the witness, Forrest Dale Campbell, which deposition was taken after the witness was sworn on oath to tell the truth, the whole truth

and nothing but the truth, in the above-entitled cause; that I truly took his testimony as it was given in answer to oral interrogatories propounded to him, in shorthand and reduced the same to typewriting as appears herein. [133]

Dated at the Town of Vulcan, in the Province of Alberta, this 17th day of October, A.D. 1945.

/s/ MYRTLE CARLSON.

(Sworn and Certified at Vulcan, in the Province of Alberta, this 17th day of October, A.D. 1945.)

Before me

[Notary Seal] /s/ HERBERT J. MABER,
A Notary Public in and
for Alberta.

Mr. Young: I have just one question or two that I want to ask my client that might properly have been asked in the case in chief.

The Court: You may put him back on again for further direct examination.

WILLIAM WADE RICKETTS

the plaintiff, recalled as a witness in his own behalf, resumed the stand and testified further as follows:

Direct Examination

By Mr. Young:

Q. Now, the last time that you came back into the country I believe you testified was in 1939?

A. 1939.

(Testimony of William Wade Ricketts.)

Q. And you established a restaurant business up in the Empire Hotel in Spokane?

A. Not at that time. I was at Metaline Falls at first. [134]

Q. Well, following that time you returned to Canada? A. Yes.

Q. Now, I would like to have in the record very definitely what actuated your return to Canada following 1939.

A. I returned to Canada in 1944 under the direction of the Immigration Service.

Q. What member of the Immigration Service requested you or told you to go back to Canada?

A. Inspector Sullivan and Walter.

Q. What was your purpose in going back?

A. To return to Canada and apply for regular visa to enter the United States for the purpose of establishing permanent citizenship.

Q. What, if anything, was said to you as to what would happen if you did not go back?

A. I was given the impression that I would be prosecuted.

Q. Not the impression; what was said?

A. I was told I would be prosecuted.

Q. What was said about any possible penalty?

A. I was warned that I could be subject to two years in the penitentiary.

Q. So with that in mind you went back up, is that correct? A. That's true.

Q. Then when did you return?

(Testimony of William Wade Ricketts.)

A. I returned to the United States I think it was the 1st [135] of September, 1944.

Q. First of September, 1944?

A. The 1st day of October, 1944.

Q. The first day of October, 1944. Now, state whether or not you maintained your business here during the time that you were up in Canada?

A. I held my business, but it was closed up for a period of five months.

Q. And what did you do in Canada when you were up there?

A. Well, I lived at the hotel in Calgary, and all this time I was endeavoring to secure a visa and the necessary papers to re-enter the States with the consent of the Immigration Board.

Q. What actuated your return to the United States?

A. I could not get the necessary papers, they wouldn't cooperate with me, and I decided to return.

Q. And you have remained ever since?

A. Yes.

Q. And following that did you commence this action for declaratory judgment?

A. That is true.

Q. Did you exhaust the procedures open to you through the Immigration Service by an appeal?

A. Beg pardon?

Q. Did you exhaust the services that were available to you [136] with the Immigration Service, take an appeal, in other words, to Philadelphia?

(Testimony of William Wade Ricketts.)

A. Yes, I did.

Q. And you received an adverse ruling, then, from the Immigration Department on the appeal?

A. That's true.

Q. And then you commenced this action?

A. Yes.

Mr. Young: I think that makes the record.

The Court: Were all the exhibits admitted?

Q. Calling your attention to Exhibit B for identification, I will ask you what it is.

A. That is a photostatic copy of a statement made by me to Mr. Cull, an insurance agent. That's a list of the questions he asked me. He wrote them down. I sat at his elbow and answered the questions as the answers appear here, and signed it with my signature.

Q. At the time and place mentioned in the exhibit? A. That's true.

Mr. Young: I will offer Exhibit B in evidence.

The Court: What is the date of that, Mr. Young?

Mr. Young: Dated at Spokane, Washington, 28th day of April, 1944.

Mr. Erickson: When was this action commenced?

The Court: I have the filing mark here on the [137] petition. It is dated February 21, 1945.

Mr. Young: That would antedate the commencement of this action. It would be at or around the time he was having his difficulty with the Immigration Service.

Mr. Erickson: Where is the answer about citizenship?

(Testimony of William Wade Ricketts.)

Mr. Young: I don't see anything in this form other than the fact that he was born at Hydro, Oklahoma, February, 1902, 42 years of age; there doesn't seem to be anything about citizenship in this exhibit.

Mr. Erickson: Then it is immaterial.

Mr. Young: I think I will withdraw it. I was informed to the contrary, but upon reading it, I don't see anything about citizenship.

Cross-Examination

By Mr. Erickson:

Q. There are a couple of questions I forgot to ask on cross-examination this morning. I wanted to ask if you had your Canadian passport visa here that you applied for? A. Mr. Young has it.

Q. Do you object to us looking at it?

A. Not at all.

Mr. Young: I don't intend to offer it. There are some conclusions on it that I wouldn't care to offer.

Mr. Erickson: At this time I would like to request to look at it. [138]

Mr. Young: I don't know what the situation is; I have some information in my pocket——

The Court: Well, I don't believe you can be compelled to produce it unless there's been some notice given or something of that sort.

Mr. Erickson: Well, the first time I knew about it was this morning. I would like to serve an oral notice to produce it in the morning so I can inspect it.

Mr. Young: The circumstances are this, your

(Testimony of William Wade Ricketts.)

Honor. I was conferring with my client; he gave me the passport. I have examined it. I don't believe it would be particularly helpful to his case, nor fatal, but I don't care to produce it in view of the fact that there are some serious matters that may follow.

The Court: If you want to urge that, Mr. Erickson, I will hear you tomorrow when we convene court.

Mr. Erickson: Yes, I would like to urge it in the morning.

Mr. Young: If under the rule it is required, I will produce it at this time.

The Court: I direct your attention to Rule 34 here in the rules, that seems to have some bearing on it, and then we can take it up when court convenes in the morning. I don't want to pass snap judgment on it at this time, and it may be understood, I think, that you [139] have the right to interrogate regarding that if you wish.

Cross-Examination
(Continued)

Q. There's another question about another matter that I would like to ask, that I forgot to ask this morning. Did you, Mr. Ricketts, after you became twenty-one years of age in Canada, at any time go to any American consul or American Immigration officer or representative in Canada and declare your intention to become an American citizen?

(Testimony of William Wade Ricketts.)

that time, that is, the United States at that time was not at war. That seemed to be the situation of the statutes with respect to expatriation, except, of course, in desertion, the Civil War statutes on desertion from the Army, and the taking of allegiance to another foreign state. Those were grounds for the loss of citizenship. Aside from those, until Section 801 was adopted, the code under which we are now operating, those were the only ways of expatriation, desertion from the Army, taking the oath of allegiance, or becoming naturalized. That is the group of statutes that 801 is derived from.

The Court: I think that is perhaps true. I haven't been able to find the prior statute, as I said [142] some time ago, but I think we have at least some decisions that have held construing the prior law, or at least decisions handed down at the time the prior law was in effect, before this amendment of 1940, that in a situation such as we have here, where a person is born in the United States either of citizens or residents, then during the minority of that person the parents take the child to a foreign country and then the parents either renounce their American citizenship or become naturalized in a foreign country, that then the minor, unless he elects within a reasonable time after reaching majority to adopt American citizenship or retain American citizenship, I should say, because he hasn't lost it, and evidences an intention to take up permanent residence in the United States and assume the duties of citizenship, that he would

(Testimony of William Wade Ricketts.)
be deemed to have renounced his American citizenship, and be expatriated. That is clearly the holding in Perkins vs. Elg.

Mr. Young: Wasn't that case decided, though, your Honor, subsequent to the adoption of Section 801?

Mr. Erickson: No, that was in 1939.

Mr. Young: I have read Perkins vs. Elg, and I must refresh my recollection as to what that case holds. Wasn't that the child of naturalized parents who went back to the country of their origin, and the election was [143] made before the youngster became twenty three, and she I think returned to this country?

The Court: No, the question of twenty three wasn't involved there, because the 1940 statute hadn't been enacted. The court held in that case that the girl, born in this country and then her parents returned to the native country and assumed the native citizenship, the Supreme Court said she had a reasonable time to make an election. The thing I am sure in that case the Court seemed to regard as material, the circumstances that this girl whose citizenship was in question, Miss Elg, had gone to the American consul in a foreign state, made inquiry, and announced her intention of resuming American citizenship. That was before she was twenty one. Under that decision it might be material to make this inquiry, not because he had any obligation under the statute, or that there was any requirement, but it might have some bearing

(Testimony of William Wade Ricketts.)

on his subsequent conduct and his intentions. With that in mind I will overrule the objection.

Mr. Young: Do you understand what the question is before you?

(Whereupon, the reporter read the last previous question, as follows: "Did you, Mr. Ricketts, after you became twenty one years of age in Canada, at any time go to any American consul or American Immigration officer or representative in Canada and declare your intention to become an American citizen?")

Cross-Examination
(Continued)

A. Yes.

Q. When and where did that take place?

A. When I crossed the border in 1925 I discussed this problem with Inspector Kelly of your service.

Q. That was in the United States?

A. That was at the United States border.

Q. Inspector Kelly was an Immigration Inspector of the service here? A. Yes.

Q. That was in the United States that you made that declaration? A. Yes.

Q. Where?

A. It was at the border line crossing the Canadian border into the United States.

Q. Well, at what town?

A. Port of Entry, Eastport, Idaho.

Q. What declaration did you make to him?

A. I asked him to declare on my citizenship that

(Testimony of William Wade Ricketts.)

I was crossing the border, and we discussed the question of citizenship. I told him I thought I was an American, and he assured me I was, at that time. [145]

Q. That is the only declaration you made?

A. That is the only one I made, yes.

Q. And that was all oral, and not in writing?

A. No, that was all oral. He assured me I would have no difficulty.

Mr. Young: I didn't get that last.

A. It was all an oral question and answer proposition, and Inspector Kelly assured me I would have no difficulty of retaining my American citizenship.

Mr. Erickson: That's all.

Mr. Young: That's all.

Mr. Erickson: With the exception of that matter I will take up in the morning.

(Whereupon, there being no further questions, the witness was excused.)

Mr. Young: At this time we rest.

The Court: I think in view of the fact that the documents with reference to the Canadian visa or passport or whatever it is would probably come in as part of the cross examination of Mr. Ricketts, I think it would be best to adjourn at this time until tomorrow morning and take up this matter at that time.

(Whereupon, at 4:45 o'clock P.M., the court took an adjournment in this cause until October 1, 1946, at 10 o'clock a.m.)

Spokane, Washington, October 1, 1946
10:00 o'Clock A.M.

(All parties present as before, and the trial was resumed.)

The Court: All right, do you want to be heard on this motion?

Mr. Erickson: If it please the Court, at this time I desire to urge the motion which has just been served and filed upon counsel this morning. It developed during the progress of this trial yesterday that pursuant to Defendant's Exhibit 9, the letter addressed to Guy Walter, that a certain Canadian passport and visa were mentioned in that letter, and at this time I desire to urge that the plaintiff be required to produce that passport and visa, on the ground that it is material to the issues in this case. I want to say that prior to the contents of that letter being called to my attention, and prior to the testimony of the plaintiff on the stand, I did not know or have any knowledge that a Canadian passport and visa had been issued to the plaintiff. It now appears that such had been issued, and it is submitted that they are material. I know that Rule 34 provides that the motion must be timely made, but the cases cited under that rule hold that if the discovery or knowledge [147] is not in possession of the moving party until it is made, that it does not have to be made in advance of trial. It is only where the knowledge is with the party seeking production at some time prior to the trial, it is neces-

sary then to move in advance of trial, and I at this time would like to seriously urge that the defendant be required to produce those because of their materiality in this case. The defendant testified on the witness stand that he was recognized as a citizen of the United States in Canda, and the fact that he applied as a Canadian to obtain a Canadian passport and visa would serve to impeach the defendant upon that statement that he made in the trial of this case.

Mr. Young: In resisting the motion I wish to call attention to defendant's Exhibit 9, which was marked as having been received by the defendant on June 26, 1944. The exhibit is a letter written by my client, and the first paragraph is the only paragraph that is pertinent to this motion. It reads "Dear Sir: It was with great disappointment that I received the copy of letter sent to Mr. Allen of the American Consul at Calgary refusing me permission to re-apply for legal entry to the United States. I had departed quite willingly from the United States as your office had requested, came to Calgary, and at great expense and inconvenience had secured all the [148] necessary papers, documents, passport, etc., to properly obtain an immigration visa and Mr. Allen was prepared to issue same to me when your letter came."

Now, that information was in the hands of the defendant on the 26th of June, 1944, and that's the only information that they could have had concerning a passport except what may have been addi-

(Testimony of William Wade Ricketts.)

A. It was prepared, apparently, in the Immigration Office in Ottawa.

Q. Did you state the purpose for which you were requesting a passport? A. I did.

Q. And what purpose did you state, and to whom did you make the statement?

A. I made it in my letter to the Department of Immigration, my sole purpose to obtain a passport to obtain an American visa to re-enter the United States.

Q. State whether or not that was done in furtherance of your general effort to retain your, reclaim your citizenship?

A. That was done in furtherance of my effort to reclaim my citizenship.

Q. At whose suggestion was it initiated? I have in mind [151] now the local Immigration authorities.

A. Locally, it was Mr. Sullivan and Mr. Walter.

Q. And were you pursuing their suggested course of procedure?

A. I was pursuing their suggested course of procedure.

Mr. Young: I am going to object to the introduction of the passport on the ground that it contains conclusions contrary to the claimed state of citizenship. Further, the passport indicates that it was given and conditioned under the condition that a certain state of citizenship existed. That state, according to our contention, did not in fact exist.

The Court: I will admit it. A good deal has

(Testimony of William Wade Ricketts.)
been said in the testimony about this passport. Of course, it will be taken with the explanation of the plaintiff as he has explained some of these other documents.

(Whereupon, Defendant's Exhibit No. 10 for identification was admitted in evidence.)

DEFENDANT'S EXHIBIT 10

Passport—Canada

We, Alexander, Earl of Athlone, Knight of the Most Noble Order of the Garter, etc., Governor-General and Commander in Chief of Canada,

Request, in the name of His Britannic Majesty, all those whom it may concern to allow the bearer to pass freely without let or hindrance and to afford him or her every assistance and protection of which he or she may stand in need.

ATHLONE.

1. This passport contains 32 pages.

PASSPORT—CANADA

No. of passport, 370250.
Name of bearer, William Wade Ricketts.
Accompanied by his wife
(Maiden name) .....
and by ..... children.
National status
British Subject by Naturalization,
Son of a British Subject by Naturalization
Canadian Local Certificate dated 31 December, 1914.

(Testimony of William Wade Ricketts.)

2. Description.

Profession, Cafe Operator and Cook.

Place and date of birth, Hydro, United States of America, 3 February 1902.

Residence, United States of America.

Height, 5 ft. 8½ in.

Colour of eyes, Grey.

Colour of hair, Brown.

Visible peculiarities, Split right index finger.

Wife ft. ..... in.....

Children,

Name ..... Date of Birth ..... Sex ....

3. Photograph of Bearer.

(Photograph attached on this page.)

WILLIAM WADE RICKETTS.

Wife.....

4. Countries for which this passport is valid.

United States of America.

The validity of this passport expires: Sixteenth June, 1946, unless renewed.

Issued at Ottawa, Canada.

Date: The Department of External Affairs, Canada, June 16, 1944.

5. Renewals.

6. Observations.

7. Visas.

8.

"This passport is granted with the qualification that the holder is, within the limits of the Dominion

(Testimony of William Wade Ricketts.)

or Colony in which he was naturalized a British subject by naturalization, and that beyond the limits of that Dominion or Colony he can only receive as a matter of courtesy the general good offices and assistance of His Majesty's representatives abroad. This courtesy cannot be extended to the holder when within the limits of the foreign State of which he was a subject or citizen prior to his naturalization, unless he has ceased to be a subject or citizen of that State in contemplation of the laws thereof or in pursuance of a treaty to that effect."

9. Warning.

A person in possession of Canadian domicile does not relinquish same by leaving Canada for a temporary purpose. If contemplating a prolonged temporary absence, the bearer of this passport should within a year from the date of leaving Canada, make a Declaration of Intention to retain Canadian Domicile before a Canadian Diplomatic or Consular Officer, or in the absence of such Official, before a Diplomatic or Consular Officer of the United Kingdom, such Declaration may be made annually for a period of five years.

A British subject by naturalization must present his Certificate of Naturalization.

(Pages 10 to 32, inclusive, in blank.)

Cross Examination
(Continued

By Mr. Erickson:

Q. You did apply for that passport in writing?

A. I did.

(Testimony of William Wade Ricketts.)

Q. And you stated in your application that you were a British subject? A. I did not.

Q. When you got the passport?

A. I did not. [152]

Q. What citizenship did you state when you applied for the passport?

A. My citizenship was not stated at all.

Mr. Erickson: That's all.

(Whereupon, there being no further questions, the witness was excused.)

Mr. Young: In view of the seriousness that might follow an adverse decision in this case, I don't wish to mislead counsel. It has been said here that the senior Ricketts became a naturalized citizen. In my opinion those statements are mere conclusions, and I wish to require and put counsel for the government on notice that I require strict proof of such citizenship of senior, Siegel Ricketts.

Mr. Erickson: Well, before I start with any testimony, then, I will have this marked.

(Whereupon, copy of certificate of naturalization of Siegel E. Ricketts was marked Defendant's Exhibit No. 11 for identification.)

Mr. Young: I am going to make objection. The document is incompetent, irrelevant and immaterial.

Mr. Erickson: The defendant's identification 11 purports to be a certificate of naturalization of one Siegel E. Ricketts. It is submitted that the same is admissible under the certification act of public documents, [153] without further identification.

The Court: I believe there is testimony here that this plaintiff's father's name was Siegel E. Ricketts, and that he came from Hydro, Oklahoma?

Mr. Erickson: Yes.

The Court: It will be admitted.

(Whereupon, Defendant's Exhibit No. 11 for identification was admitted in evidence.)

DEFENDANT'S EXHIBIT 11

Dominion of Canada,
City of Ottawa,
Embassy of the
United States of America.

I, Girvan Teall, Vice Consul of the United States of America at Ottawa, Canada, duly commissioned and qualified, do hereby certify that the signature of E. H. Coleman on the document hereto annexed is his true and genuine signature, and that he was on the day of signing said document Under-Secretary of State of Canada; that the seal affixed to said document is his seal of office and that full faith and credence are due and ought to be given to such signature and seal.

In Witness Whereof, I have hereunto set my hand and affixed the seal of my office this 17th day of May, 1946.

Seal American Consular Service

GIRVAN TEALL,

Vice Consul of the United States of America,
Ottawa, Canada.

Service No. 355. No fee prescribed.

Department of the Secretary of State of Canada
Naturalization Branch
Ottawa, May 17, 1946.

I hereby certify the within to be a true and faithful copy of the original Certificate of Naturalization of Seigel E. Ricketts as filed of record in this office.

E. H. COLEMAN,
Under-Secretary of State.

Seal Secretary of State of Canada

The Naturalization Act
Certificate of Naturalisation

Dominion of Canada,
Province of Saskatchewan.

In the District Court of the Judicial District of Battleford

Before His Honour Jas. F. MacLean, the Judge of said Court, sitting in Chambers:

Whereas Seigel E. Ricketts, formerly of Hydro, State of Oklahoma, one of the United States of America, now of Mullingar in the Province of Saskatchewan, farmer, has complied with the several requirements of the Naturalisation Act, and has duly resided in Canada for the period of three years. And whereas the certificate granted to the said Seigel E. Ricketts under the fifteenth section of the said Act has been duly presented to the said Judge sitting in Chambers in the said Judicial District and whereas a copy of such certificate has been duly

posted up in a conspicuous place in the office of the clerk of the said Court and the said Judge has directed the issue of a Certificate of Naturalisation to the said Seigel E. Ricketts,

This is therefore to certify to all whom it may concern that, under and by virtue of the said Act Seigel E. Ricketts has become naturalised as a British subject, and is, within Canada, entitled to all political and other rights, powers and privileges and subject to all obligations to which a natural born British subject is entitled or subject within Canada with this qualification, that he shall not when within the limits of the foreign State of which he was a citizen previous to the date hereof, be deemed to be a British subject unless he has ceased to be a citizens of that State, in pursuance of the laws thereof, or in pursuance of a treaty or convention to that effect.

Given under the seal of the said Court this thirty-first day of December, one thousand nine hundred and fourteen.

H. R. SKELTON,
Clerk of the District Court.

L. S. This is a true copy of the Certificate granted to the above-named person.

H. R. SKELTON,
Clerk. [243]

L. J. BRUNNER

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Erickson:

Q. Will you state your name, please?

A. Leonard J. Brunner.

Q. And where do you reside, Mr. Brunner?

A. Oroville, Washington.

Q. And what is your business?

A. Immigrant Inspector in charge of the United States Immigration Office at Oroville, Washington.

Q. You have been employed for a number of years by the Immigration Service?

A. Yes, sir.

Q. How long have you been stationed at Oroville? A. Twelve years and six months.

Q. Are you acquainted with William Wade Ricketts, the plaintiff [154] in this case?

A. Yes, sir.

Q. I will hand you defendant's Exhibits 3 and 4, purporting to be a manifest dated September 6, 1936, and record of alien admitted September 6, 1936, and ask you if you are acquainted with those two documents? A. I am.

Q. Were they prepared or not prepared in your presence?

A. They were made out by myself, personally.

Q. Mr. Brunner, what were the circumstances connected with the preparation of those exhibits 3

(Testimony of L. J. Brunner.)

and 4, as to whether or not they were prepared with the voluntary cooperation of the plaintiff or not?

A. They were.

Q. Will you explain the circumstances under which they were prepared?

A. This, I think it is number 3, manifest card, is made right on the counter in the presence of the applicant, and the questions as written on this card are asked him, and as he answers them they are recorded on this card chronologically, and after the completion of the card the card is handed to him and turned over and he is allowed to inspect it if he cares to, but his answers are written in his plain vision rights across the counter, and he signs the card. [155]

Q. Are the questions asked by yourself and the answers put down by yourself?

A. Yes, sir, right in his presence.

Q. With regard to the record of alien admitted, how is that prepared?

A. That is prepared immediately after this form is prepared. This is our office file copy, that remains in the office. This form is made in duplicate and the white copy is given to the person at the time of admission. The yellow copy is kept in our file, and upon the return of the alien to Canada, on the surrender of the white copy, it is returned to us and attached to this, and returned to our file, attached to the duplicate copy.

Q. Do you remember a conversation you had

(Testimony of L. J. Brunner.)

with Mr. Ricketts about the preparation of those forms?

A. Well, very little at that time; I remember that when he was on the stage at that time, when he arrived, and when I asked him where he was born, he said "Hydro, Oklahoma," and invariably the next question is "A citizen of what country?" which is practically the next question followed.

Mr. Young: I am going to object to the usual procedure. If the witness is testifying to what he actually did in this case that is one thing.

The Court: I'll sustain the objection. The question, I think, is what happened in this particular transaction, as nearly as you can remember it.

A. I see. I asked Mr. Ricketss "A citizen of what country?". He said "Canada." I said "By what right do you claim to be a citizen of Canada?". He said "Through my father's naturalization." I said "When was he naturalized in Canada?". He said "1913 or 1914." Immediately I turned the card and the notation "Father naturalized in Battle Ford, Saskatchewan, in 1913 or 1914" written in my own handwriting at the same time.

Mr. Erickson: That's all.

Cross-Examination

By Mr. Young:

Q. About how many transactions a year do you handle of this nature?

A. Well, sir, we handle in the neighborhood of maybe three or four thousand in a year at the present time. At that time it was not so numerous.

(Testimony of L. J. Brunner.)

Q. Well, about how many do you think you were handling at that time?

A. Our office handled about five hundred.

Q. This card is dated September 6, 1936, just exactly ten years ago, a little more than ten years ago. How many thousand transactions of this nature do you suppose you have handled during the ten years' time, the past ten years?

A. That's pretty hard to say right off hand. I imagine I personally handled about between two and three thousand. [157]

Q. You had no personal acquaintance with Mr. Ricketts prior to this transaction?

A. Prior to that? No, sir.

Q. The fact is that what you are testifying to here is that you believe you followed the usual procedure in the Ricketts case, of asking the questions and putting down the answers, isn't that true, rather than recollecting independently this particular conversation after an elapse of ten years?

A. No, sir.

Q. You believe that you recall the particular conversation which you had with Mr. Ricketts on that occasion?

A. Quite a lot of it, yes, sir.

Q. Quite a lot of it?

A. Quite a lot of it, yes, sir.

Mr. Young: That's all.

(Testimony of L. J. Brunner.)

Redirect Examination

By Mr. Erickson:

Q. It is your handwriting on the entire card, is it not? A. Yes, sir, on both exhibits.

Mr. Erickson: That's all.

(Whereupon, there being no further questions, the witness was excused.)

GUY H. WALTER

called as a witness on behalf of the defendant, being first duly sworn, testified as follows: [158]

Direct Examination

By Mr. Erickson:

Q. Will you state your name, please?

A. Guy H. Walter.

Q. And what is your business, Mr. Walter?

A. Inspector, Immigration and Naturalization Service.

Q. And you have been inspector for some years?

A. Over twenty years.

Q. You are presently situated in Spokane?

A. That's right.

Q. Are you acquainted with the defendant, or rather, plaintiff in this case, William Wade Ricketts? A. I am.

Q. Are you acquainted with Immigration Form Number I-55, a General Information Form?

A. Yes.

(Testimony of Guy H. Walter.)

Q. Do you remember having any conversation with William Wade Ricketts about such a form, filling out such a form?

A. I do not remember specifically having any conversation.

Q. State whether or not you gave Mr. Ricketts a specific instruction to fill out that form?

Mr. Young: I believe in view of the witness' statement he did not remember anything about it, he could not testify that he gave specific instructions. I therefore object to him answering that question.

The Court: Read the prior question and answer.

(Whereupon, the reporter read the last previous question and answer.)

Mr. Erickson: Then I will withdraw the question. If he didn't have any conversation he couldn't answer.

Direct Examination
(Continued)

Q. Well, do you recall anything at this time about that form and Mr. Ricketts?

A. I could only state in a general way what conversation that I have in connection with the filing of this form in the usual case of this nature.

Mr. Young: Well, I am going to object to that, because this is what was said and done in this case.

The Court: Yes, I think I will have to sustain the objection to the practice.

Mr. Erickson: That's all, then, at this time, Mr. Walter.

Mr. Young: No questions.

(Whereupon, there being no further questions, the witness was excused.)

CARL E. JOHNSTON

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Erickson:

Q. Will you state your name, please?

A. Carl E. Johnston. [160]

Q. What is your business?

A. Immigrant Inspector.

Q. Were you such on or about October 26, 1937?

A. No, sir.

Q. What were you at that time?

A. A stenographer.

Q. Directing your attention to a hearing that took place at Vancouver, British Columbia, on October 26, 1937, were you present at that hearing?

A. Yes, sir.

Q. And that hearing was in regard to William Wade Ricketts? A. Yes, sir.

Q. The plaintiff in this case?

A. Yes, sir.

Q. And what function did you have at that hearing?

A. I was the secretary of the Board of Special Inquiry.

(Testimony of Carl E. Johnston.)

Q. And as such, was Mr. Ricketts placed under oath at that hearing? A. No, sir.

Q. I beg pardon? A. No, sir.

Q. What proceedings took place at that hearing?

A. He was excluded from admission to the United States.

Q. Well, what was the nature of the hearing? Did he have a hearing, or not? [161]

A. Yes, he had a hearing.

Q. What kind of a hearing did he have?

Mr. Young: I am going to object to the witness interpreting the kind of hearing he had. Apparently there was a record made.

The Court: I think what counsel is asking you, what was done, what procedure did you follow?

A. The plaintiff was an applicant for admission to the United States. He was placed before a Board of Special Inquiry to determine his admissibility.

Q. And was his testimony taken at that time?

A. Yes, it was.

Q. And did you take his testimony?

A. Yes, sir.

(Whereupon, record of Board of Special Inquiry, October 26, 1937, was marked Defendant's Exhibit No. 12 for identification.)

Mr. Young: I assume that the witness will say that this is something that he prepared?

Mr. Erickson: Yes.

(Testimony of Carl E. Johnston.)

Cross-Examination

By Mr. Young:

Q. Now, Mr. Johnston, there appears some data at the top of this exhibit, before the questions and answers. Where did you receive that information?

A. That information is a transcript of a manifest form, similar [162] to the previous exhibit.

Q. I see; and then you put that on in a part of the form? A. Yes, sir.

Q. Then the applicant was questioned by Inspector Illman? A. Correct.

Q. Who was the chairman of this Board of Inquiry; he wasn't put under oath, is that correct?

A. No, sir.

Q. And you made this record, and I suppose you had some shorthand notes? A. Yes, sir.

Q. And then on the basis of your shorthand notes you made this record? A. Yes, sir.

Q. Which purports to be questions and answers. Was this ever submitted to Mr. Ricketts for his signature, or for his examination, for the purpose of checking upon the accuracy or lack of accuracy of your report, so far as you know?

A. Not at the time.

Q. Do you think it ever was submitted to him?

A. Not to my knowledge.

Q. As a matter of general procedure, this record is made for the purposes of the Immigration Bureau, is that correct, or what is the technical name of your department? [163]

(Testimony of Carl E. Johnston.)

A. Immigration Service. Yes.

Q. Now, this procedure. Inspector Brakke: "I move that the applicant be refused admission to the United States as an immigrant alien" and so forth; Carl Johnston: "I second the motion"; Inspector Illman: "Unanimous." Did that take place in the presence of Mr. Ricketts? A. Yes, sir.

Q. And you, the clerk, seconded the motion?

A. Correct.

Q. You took down the notes and then you seconded the motion? A. Yes.

Q. And became, in a way, an adverse party against his admission to the United States, is that correct? A. Yes, sir.

Mr. Young: I am going to object to this exhibit. It appears that it is a narration of an informal hearing before a board which is a part of the Immigration Service. The questions and answers with respect to Canadian citizenship is but a mere conclusion. It does not appear that the plaintiff was given an opportunity to check the answers, or anything of that sort. He was never submitted the document. The witness could testify concerning what took place, but I think to offer that exhibit as being a record and as being some testimony that would be binding upon my client I think would be highly improper and prejudicial. [164]

Mr. Erickson: Well, if he testified in court orally to the same thing you say you would have no objection then?

Mr. Young: I am objecting, yes.

(Testimony of Carl E. Johnston.)

The Court: I think most of the matters to which counsel refer go to the weight of it rather than admissibility. Did you make an accurate record of what was done there, in questions and answers?

A. Yes, sir, verbatim testimony.

The Court: It will be admitted.

(Whereupon, Defendant's Exhibit No. 12 for identification was admitted in evidence.)

DEFENDANT'S EXHIBIT No. 12

Form 611—U. S. Department of Labor, Immigration and Naturalization Service.

Names of Aliens—William Wade Ricketts.

Record of Hearing before a Board of Special Inquiry, held at Vancouver, B. C.

Date: October 26, 1937.

Present: Insp. Alpheus M. Illman, Chairman. Earl F. Brakke, Member. Clerk Carl E. Johnston, Member & Sec. Int.

B.S.I. No. 13710/134.

Arrived (date and manner):

Held by: Robottom Cause:

Manifest Data:

Ricketts, William Wade, 35m; single; restaurant owner; literate; Citizen of Canada, born Hydro, Oklahoma; Scotch race; last permanent residence, Kamloops, B. C.; has father, Seidle Ricketts, Bellingar, Saskatchewan; resided in

(Testimony of Carl E. Johnston.)

U. S., from birth to 1910, and June 14th to October 24, 1937; destined to Antlers Grill, Twisp, Washington, to reside permanently, or 30 to 60 days; never arrested and deported, or excluded from admission; height, 5′8½″; dark brown hair; blue eyes.

Appliant present, questioned by Inspector Illman, Chairman.

Q. State your full name, please?

A. William Wade Ricketts.

Q. Have you ever used any other name?

A. No.

Q. Were all the answers you made to the Inspector who prepared this manifest card true?

A. Yes, sir.

Q. What is your purpose in going to the United States?

A. I am going back to my business down there at Twisp, Washington.

Q. Do you wish to go down there to visit or to live?

A. I want to go down there to live and I was in to see Mr. Wyckoff at Spokane, and he advised me to come back up here for a visa, but I have my papers, but it will take some time to get the papers through.

Q. What is your nationality?

A. Canada.

Q. When and where were you born?

A. Hydro, Oklahoma, February 3, 1902.

Q. How did you become a Canadian?

(Testimony of Carl E. Johnston.)

A. My father was naturalized in 1910.

Q. It is my understanding that your last residence was at Kamloops, B. C.; that you are a restaurant owner by occupation; never been married, and never refused admission to, or deported from the United States. Is this all true?

A. Yes, sir.

Q. That you lived in the United States from birth to 1910, and again from June of this year to October, 1937? A. Yes, sir.

Inspector Brakke: I move that the applicant be refused admission to the United States as an immigrant alien not in possession of an unexpired immigration visa.

Clerk Johnston: I second the motion.

Inspector Illman: Unanimous.

Chairman to Applicant: This board has voted to exclude you from admission to the United States as an immigrant alien not in possession of an unexpired immigration visa. From this decision you have the right of appeal to the Secretary of Labor, to whom in the event appeal is taken, the entire record will be forwarded for review and decision. Notice of appeal may be given orally at this time, or in writing within forty-eight hours. Do you wish to appeal? (No appeal recorded.)

You are excluded from admission to the United States for a period of one year, unless permission to reapply for admission is granted you by the Secretary of Labor. Application for such permission should be forwarded to the Secretary through this office.

(Testimony of Carl E. Johnston.)

Chairman (Continuing): You are cautioned that illegal entry into the United States is punishable by both fine and imprisonment and will render you subject to arrest and deportation, and if you are arrested and deported you will be excluded from admission to the United States for a period of one year and may then reapply only with the consent of the Secretary of Labor previously obtained.

(District Form M-341—notice of exclusion—issued.)

Attest:

CARL E. JOHNSTON,
Clerk.

Notes recorded in Book 3326-141.

Notes Transcribed March 1, 1938.

Mr. Erickson: That's all for Mr. Johnson. I don't desire to read it to the court, any of these exhibits. We haven't any jury, and the court can consider them at his leisure.

(Whereupon, there being no further questions, the witness was excused.)

FRANK S. NOONEY

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Erickson:

Q. Will you state your name, please?

A. Frank S. Nooney. [165]

(Testimony of Frank S. Nooney.)

Q. And what is your business, Mr. Nooney?

A. I am assistant to the operations officer in the United States Immigration office here.

Q. And in 1937 you were occupying what capacity with the Immigration Service at that time?

A. I was an Immigrant Inspector.

Q. Are you acquainted with the plaintiff in this case, William Wade Ricketts? A. Yes.

Q. You have known him for a number of years?

A. Yes.

Q. Now, directing your attention to March 1, 1938, where were you employed at that time, what station? A. In the Spokane office.

Q. And you were stationed at Twisp?

A. No, I was stationed at Spokane.

Q. But were you at Twisp on that date?

A. Yes.

Q. And what proceedings did you have in the case of William Wade Ricketts on or about March 1, 1938, at Twisp?

A. I took a statement from him there. I found him in the country unlawfully.

Mr. Young: I am going to object to that as a conclusion of this witness, and move it be stricken.

The Court: The objection will be sustained; the [166] answer will be stricken from the record.

Q. Just as to what you did, Mr. Nooney?

A. I placed him under oath and took a sworn statement from him.

Q. Did you have the power at that time to administer oaths? A. Yes, I did.

(Testimony of Frank S. Nooney.)

Mr. Young: I think in the interest of my client I should object to that. The answer came a little quicker than I was able to think. I don't know whether he has the power or not; it may be a conclusion.

The Court: Well, it is rather a conclusion. I'll let it stand as an answer that he had been administering oaths.

(Whereupon, record of hearing on March 1, 1938, was marked Defendant's Exhibit No. 13 for identification.)

Direct Examination
(Continued)

Q. I hand you defendant's identification 13, and ask you to state what that is, Mr. Nooney?

A. That is a transcript of the notes, longhand notes, that I made at the time that I took this statement from Mr. Ricketts.

Q. Are the answers thereon the answers in the language of Mr. Ricketts as he responded to the questions asked by yourself? [167]

A. Yes.

Mr. Erickson: I offer 13 in evidence.

Mr. Young: May I ask you where your longhand notes are from which you made the statement?

Witness: In this book.

Mr. Young: I am going to make the objection again that this amounts to no more than a memorandum from which the witness could refresh his recollection and testify as to what was said and

(Testimony of Frank S. Nooney.)

done at the time and place in question; object to it as incompetent, irrelevant and immaterial.

The Court: Is this the original?

Mr. Erickson: No, the original is in the Central Office file. We have the original. I would like to substitute that as copy.

The Court: Well, this was not signed by the plaintiff.

Mr. Erickson: No. Are your original notes signed, Mr. Nooney?

Witness: Yes, they are.

The Court: I notice there is a note on the bottom "Alien signs notebook, William Wade Ricketts." He signs your original notes, is that it?

Mr. Young: If I had an opportunity to go over these original notes, if we can go on to something else. [168]

Mr. Erickson: I would be perfectly willing that that be held up. You can have it during the noon hour, Mr. Young, and compare it with the original.

The Court: Are these exact copies of your notes as they appear in the notebook?

Witness: Except, naturally, when we record statements, we do take shortcuts on the things we know as a matter of general practice, for instance, the warning, and the oath that is administered, we use the same one every time, and I didn't put that all down word for word.

Mr. Young: Let me ask you this question.

(Testimony of Frank S. Nooney.)

Cross-Examination

By Mr. Young:

Q. When you interviewed Mr. Ricketts, you had some conversation with him before you started your examination, did you not?

A. I believe so, yes.

Q. You told him that you were an Immigration Inspector? A. That's right.

Q. And you considered that he was illegally in the country?

A. I don't recall that I made that statement to him.

Q. You had information that he had been, prior to that time, ordered out of the United States?

A. I believe so, yes.

Q. And you discussed generally his status of citizenship with him, didn't you? [169]

A. I don't believe so.

Q. And you told him that he was a Canadian citizen, didn't you? A. No, I don't think so.

Q. You don't recall ever telling him that?

A. I don't think I made such a statement.

Q. Well, it was your position that he was a Canadian citizen, isn't that correct, that is, the position of your Department? A. Yes.

Q. You had been sent up armed with that information, had you not? A. Yes.

Q. And you had had the access to defendant's Exhibit 12 before?

A. No, I didn't have that at the time.

(Testimony of Frank S. Nooney.)

Q. Well, had you seen it before? A. No.

Q. You hadn't seen it before? Well, you had received some instructions from your superiors as to what you were to do in connection with Wade Ricketts? A. Yes.

Q. And in asking him these questions in the premliminary, before you started writing down your answers, you had explained to him what you thought was right, that he was [170] a Canadian citizen, is that correct?

A. I don't think any such explanation was made.

Q. Are you positive that such an explanation wasn't made? A. I think I can say yes.

Q. You're positive that you did not assert, before you started taking your evidence from him, or your record from him, that he was in fact a Canadian citizen? A. Yes.

Mr. Young: I think that's all.

The Court: I think this original is admissible, but I doubt that we should admit a copy when the original with the signature of the plaintiff is available. It might be in less convenient form.

Mr. Erickson: Will you pick out the original, Mr. Nooney?

The Court: That original he has is simply the original of this?

Mr. Erickson: Yes.

The Court: It is not signed either?

Mr. Erickson: No.

The Court: What I had in mind was that the real original is the notes, signed.

(Testimony of Frank S. Nooney.)

Mr. Erickson: The notebook? I will offer these in evidence.

The Court: Does that have notes in it other than [171] this particular one?

Mr. Erickson: Yes.

The Court: You will have to offer just this particular one, so much of the notes as apply to the plaintiff.

Mr. Erickson: I will ask Mr. Nooney to designate what apply to this case, and offer those.

Mr. Young: May I make this suggestion. I don't want to be hyper-technical here, but if the witness would just testify or read from his notes into the record what he did, I think that would be proper. I just don't want to have some construction placed with the notes as finally made up that might injure my client.

The Court: Have you any objection to that?

Mr. Erickson: No, I haven't.

The Court: Could you read from your notes?

Mr. Erickson: After the formal part.

Redirect Examination

By Mr. Erickson:

A. Yes; "What is your true and correct name?" "William Wade Ricketts." Have you ever been known by or used any other name or names?" "No." "When and where were you born?" "In Hydro, Oklahoma, February 3, 1902." "Of what country are you now a citizen?" "Canada." "How did you acquire citizenship in Canada?" "Through

(Testimony of Frank S. Nooney.)

my father's naturalization there. He took out his naturalization papers in Canada while I was a minor, and that qualified me as a [172] Canadian citizen."

Mr. Young: Now, I want to object to that answer as being merely a conclusion on the part of my client as to what happened to him by reason of his father taking out citizenship, and in order to avoid interruption, I would like to have a general objection to the whole testimony.

The Court: The record may show that; the objection will be overruled.

A. (Continuing): "When and where was he naturalized in Canada?" "At Battle Ford, Saskatchewan, about 1914, I should judge. I can't give you the exact date." "Have you seen his Canadian papers?" "Yes." "Of what racial descent are you?" "Scotch-Irish." "Are you married or single?" "Single.' "Have you ever been married?" "No." "When and where did you last enter the United States?" "At Oroville, Washington, about November 3, 1937, but you won't have any record of it." "Why not?" "Because I just walked across the line." "What time of the day or night?" "About four o'clock in the morning." "Who accompanied you?" "Nobody." "Where did you come from?" "From Vancouver, B. C., or rather, Kamloops, B. C." "What was your destination in the United States?" "Twisp, Washington." "Where did you cross the border with reference to the United States Immigration Office?" "Oh,

(Testimony of Frank S. Nooney.)

in [173] the dark, I should judge about a mile west. I just came over the hills, it wasn't neglect of duty on the part of the officers there." "Why did you take the route you did?" "Well, because I had been refused admission by the American Immigration Officers at Vancouver, and I knew I could not come in legally. I went to the American Consul at Vancouver and applied for a visa, but I did not have the necessary papers, so I then went to the Immigration Office and applied for two months leave to take care of my business here, but they refused me, so I came anyway." "The United States Immigration Office at Vancouver told you, did they not, that you were excluded for one year, and that if you entered illegally you would be subject to prosecution?" "Yes." "Did anyone advice you or assist you in coming to the United States then?" "No." "How did you get from Kamloops to the border?" "I drove my car." "Had you driven from Vancouver?" "Yes." "How did you come from Oroville to Twisp?" "I walked most of the way and hitch-hiked a little." "What became of your car?" "I sent a friend back for it. It was an American car, but it wasn't mine, exactly." "Isn't it a fact that that friend met you and brought you across the border to Twisp?" "No." "Did you deliberately elude and evade inspection by United States Immigration officers because you knew you would not be admitted if you applied in the [174] regular way?" "Yes." "And you were fully aware that by entering as you did you were subject to prose-

(Testimony of Frank S. Nooney.)

cution?" "Yes." "Have you ever previously been arrested?" "No, I never have." "Never on any occasion?" "No." "Do you have any close relatives in the United States?" "Yes, I got a brother." "What is his name?" "Wayne Ricketts." "Where is he?" "Newport, Washington." "Are your parents living?" "My father is, but not my mother; she died a year ago." "When did you come to the United States first from Canada?" "In September, 1936." "How long were you admitted for at that time?" "Two weeks, then I got an extension. Captain Brunner at Oroville gave me a six month extension, but I had overstayed my two weeks by two months, so that made eight months in all." "Did you get any further extension of stay?" "Well, I went back to Canada, through Oroville, about the first of June, 1937, and stayed two weeks, and then re-entered at Cascade on the 14th or 16th of June, 1937. I entered legally for three months, then I went to see Mr. Wyckoff in Spokane, and he told me to take my time in going back. It was him sent me to Vancouver to get my visa to enter legally." "When did you leave the United States the last time?" "The 23rd or 24th of October, 1937." "Where did you leave the United States?" "At Blaine." "When did you first enter into business here in Twisp?" "August 1, 1937." [175] "What did you do here prior to that?" "Just visiting here with friends." "Are you willing to sign these longhand notes?" "Yes."

Mr. Erickson: That's all the questions I have.

(Testimony of Frank S. Nooney.)

The Court: Any further cross-examination?

Mr. Young: No.

(Whereupon, there being no further questions, the witness was excused.)

The Clerk: Mr. Erickson, in view of that, do you wish to withdraw this?

Mr. Erickson: Yes, I request to withdraw identification 13.

The Court: Identification 13 will be withdrawn.

PETER SZAMBELAN

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Erickson:

Q. Will you state your name, please?

A. Peter Szambelan.

Q. And what is your business?

A. Immigrant Inspector, Immigration and Naturalization Service, Portland, Oregon.

Q. Were you such on March 3, 1938?

A. No, I was not.

Q. What were you then? [176]

A. I was a stenographer in the Immigration office in Spokane, Washington.

Q. And your duties were to take down shorthand notes at hearings, and later to transcribe them into writing? A. That's right.

(Testimony of Peter Szambelan.)

Q. Directing your attention to
did you act as stenographer at a h
William Wade Ricketts was questi

A. I did.

Q. What kind of a hearing was

A. It was a deportation hearing
there, the explanation of deportati
a hearing given by the Immigration
into Mr. Ricketts' right to be and
United States, and particularly to
opportunity to show cause why he
deported from the United States.

Q. Was he sworn, placed on oa
ing? A. Yes, he was.

Q. And you made original sho
that hearing? A. Yes, I did

Mr. Erickson: Well, I would ju
ceed as we did in the last case, ha
hand notes read, or I have the tr

Mr. Young: Let me look at the
will make the same record objectio
document. [177] I assume that th
is to again put forth the admissio

(Testimony of Peter Szambelan.)

of admission against interest made by the pla
in the course of those hearings.

Mr. Erickson: That is the view I take, bu
only way I know to get the whole statement
to offer everything said at the hearing.

Mr. Young: I am just going to make the r
objection in order to protect the theory that
going to address the court on later in the tri
am not going to require that the stenographer
all his notes.

The Court: I think it might be well to hav
witness testify that he personally made that
scription and that it is an accurate transcri
of his shorthand notes, what the plaintiff sai

(Whereupon, record of hearing held at
kane, Washington, March 3, 1938, was m
Defendant's Exhibit No. 14 for identifica

Q. (By Mr. Erickson): I will hand yo
fendant's identification [178] 14, Mr. Szam
and ask you whether or not you transcribed
shorthand notes, and whether or not identifi
14 now is an accurate typewritten report o
shorthand notes that you had?

(Testimony of Peter Szambelan.)

in other words, my shorthand notes were transcribed the same day.

Mr. Erickson: Then I will offer 14.

Mr. Young: I am making the objection I have heretofore made, incompetent, irrelevant, and immaterial.

The Court: It will be admitted over objection of the plaintiff.

(Whereupon, Defendant's Exhibit No. 14 for identification was admitted in evidence.)

[Defendant's Exhibit No. 14 set out on pages 264 to 284.]

Mr. Erickson: Then that's all, Mr. Szambelan.

Mr. Young: No questions.

(Whereupon, there being no further questions, the witness was excused.)

MARY M. SEELEY,

called as a witness on behalf of the defendant, being first duly sworn, testified [179] as follows:

Direct Examination

By Mr. Erickson:

Q. Will you state your name, please?

A. Mary M. Seeley.

Q. And you're not employed by the Immigration Service now? A. No, I am not.

Q. You were employed formerly, on April 1, 1942, by the Immigration Service?

A. Yes, I was.

(Testimony of Mary M. Seeley.)

Q. In Spokane; in what capacity were you employed at that time? A. I was a stenographer.

Q. During your employment, and directing your attention to on or about April 1, 1942, was a—state whether or not a sworn statement was taken from the plaintiff in this case, William Wade Ricketts, on that day. A. Yes, it was.

Q. And who was present?

A. Inspector Walter, Mr. Ricketts, and myself.

Q. And where was it taken?

A. In Inspector Walter's office.

Q. In Spokane, Washington?

A. In Spokane, Washington.

(Whereupon, record of hearing held at Spokane, Washington, April 1, 1942, was marked Defendant's Exhibit No. 15 for identification.)

Direct Examination
(Continued)

Q. You have the original shorthand notes of that hearing at the present time, do you, Mrs. Seeley?

A. Yes, I have.

Q. I will hand you Defendant's Identification 15, and ask you to state whether or not that is an accurate transcription of your original shorthand notes?

A. This is an accurate transcription of my original shorthand notes, made on May 1, or April 1, 1942.

Q. State whether or not Mr. Ricketts was placed under oath at that time?

(Testimony of Mary M. Seeley.)

A. He was placed under oath.

Mr. Erickson: Now, I offer 15, Mr. Young. It is rather long.

The Court: The Court hasn't looked at these last two exhibits. I assume that they do contain some material admission by the plaintiff that he was a Canadian citizen or British national?

Mr. Erickson: Yes, that's true.

Mr. Young: I wish to make the same objection as to this, without examining it; it is incompetent, irrelevant, and immaterial.

The Court: It will be admitted, and the record will show over the objection of the plaintiff. [181]

(Whereupon, Defendant's Exhibit No. 15 for identification was admitted in evidence.)

[Defendant's Exhibit No. 15 set out on pages 285 to 311.]

Mr. Erickson: Are there any questions of this witness?

Mr. Young: No.

(Whereupon, there being no further questions, the witness was excused)

DORIS H. CREWS

called as a witness on behalf of the defendant, being first sworn, testified as follows:

Direct Examination

By Mr. Erickson:

Q. Will you state your name, please?

A. Doris H. Crews.

(Testimony of Doris H. Crews.)

Q. And where do you reside now, Mrs. Crews?

A. In Spokane.

Q. Directing your attention to on or about August 2, 1943, were you employed by the Immigration and Naturalization Service on that date?

A. No, I wasn't.

Q. I beg pardon? A. No.

Q. When were you employed by the Immigration Service? A. In 1942, until April, 1943.

Q. I must have the date wrong here. On November 30, 1942, were you employed by the Immigration Service, is that correct? [182]

A. Yes.

Q. Are you acquainted with the plaintiff in this case, William Wade Ricketts?

A. Well, I took a statement from him.

Q. You recognize him as a man you took the statement from?

A. Well, I wouldn't have recognized him, no.

Q. But you did take a statement from a William Wade Ricketts at that time? A. Yes.

Q. Did you make shorthand notes of that statement? A. Yes.

Q. And did you later transcribe those shorthand notes into a typewritten statement? A. Yes.

(Whereupon, record of hearing held at Spokane, Washington, November 30, 1942, was marked Defendant's Exhibit No. 16 for identification.)

Q. I had you defendant's Identification 16, and ask you whether or not that is an accurate and com-

(Testimony of Doris H. Crews.)

plete report of the shorthand notes that you originally took in that hearing? A. Yes.

Mr. Erickson: I offer it.

Mr. Young: I will make the same objection heretofore made, incompetent, irrelevant and immaterial. [183]

The Court: It is offered for the same purpose, I assume, as showing some admission of the plaintiff, Mr. Erickson?

Mr. Erickson: I beg pardon?

The Court: This one is offered for the same purpose as the others, some admission?

Mr. Erickson: Yes.

The Court: It will be admitted.

(Whereupon, Defendant's Exhibit No. 16 for Identification was admitted in evidence.)

DEFENDANT'S EXHIBIT "16"

U. S. Department of Justice
Immigration and Naturalization Service
Spokane, Washington

Spokane file 9012/7999
C. O. file 55973/230

Sworn Statement of William Wade Ricketts
Made at Spokane, Washington,
on November 30, 1942

Present:

William Wade Ricketts, Alien; Guy H. Walters, Special Inspector; Doris H. Crews, Stenographer.

Inspector Walter to Mr. Ricketts: You are advised that I am a United States Special Inspector

(Testimony of Doris H. Crews.)

Defendant's Exhibit No. 16—(Continued)

and authorized by law to administer oaths in connection with the enforcement of the immigration and naturalization laws of this country. I desire to take a statement from you at this time for the purpose of obtaining additional information which will enable this Service to properly determine your present citizenship status. Any statement you make should be voluntary, and you are hereby warned that any such statement may be used against you in any criminal or deportation proceeding. Are you willing to answer my questions under those conditions? A. Yes, sir.

Q. Do you solemnly swear the statements you make will be the truth, the whole truth, and nothing but the truth, so help you God? A. I do.

Q. I must warn you that every person who, having taken an oath before an officer of the government in any case in which a law of the United States authorizes an oath to be administered that he will testify truthfully, who wilfully and contrary to such oath states and subscribes to matters which he does not believe to be true, is guilty of perjury and upon conviction shall be punished by a fine or not more than $2,000 or imprisonment of not more than five years. Do you understand? A. Yes.

Q. What is your full, true and correct name, occupation, and present place of residence?

A. Full name is William Wade Ricketts, present occupation is cafe operator, and my address is 110 North Division Street, Spokane, Washington.

(Testimony of Doris H. Crews.)

Defendant's Exhibit No. 16—(Continued)

Q. Have you used any other names at any time?

A. Yes.

Q. State them please.

A. Walter Richards.

Q. Was there another?

A. At Marcus and Colville in 1939 they called me Ward Richards, but I never signed my name.

Q. When and where were you born?

A. I was born in Hydro, Oklahoma, February 3, 1902.

Q. What was your father's name and where was he born?

A. Seigle Ricketts. I can't give you his place of birth, I think it was Indiana State. No, I'm mistaken, it was Redoak, Iowa.

Q. Are you the same William Wade Ricketts who made a sworn statement before me at this office on April 1, 1942? A. Yes.

Q. I now show you a transcript of that statement and ask you if all the answers given by you to the questions asked at that time were true and correct to the best of your knowledge and belief?

A. (After reading statement): Yes, except that my mother's birthplace was Bartonville, Illinois, instead of Barnville, Illinois, as shown.

Q. In the sworn statement made by you before me on April 1, 1942, you stated, among other things, that you had voted once in Canada about the year 1928. Is that correct?

(Testimony of Doris H. Crews.)

Defendant's Exhibit No. 16—(Continued)

A. Yes, but I believe it was the year 1927 when I check back.

Q. At what place in Canada did you vote on that occasion?

A. It was in the—I think it was the Chaton District, Alberta, and the voting place was the Arrow Wood school house, and it was the provincial election in 1927, I believe, it couldn't have been in 1928.

Q. Did you under the laws of Canada have a right to participate in that election? A. Yes.

Q. How old were you at that time?

A. Well, I'd be twenty-five years old.

Q. Did you go to the polls freely and voluntarily and vote of your own accord? A. Yes.

Q. You have stated that that was a provincial election, did you vote to determine the selection of any officer or officers to any position in the provincial government?

A. In the provincial government, yes.

Q. What offices in the provincial government did you vote to fill?

A. Now that is a question that is awfully hard to answer. The ballot they use there is similar to the one here. It is for a number of officers, but they use an odd type of ballot. It was voting for the *per*miership of the province, that is the premier, he is the same as your governor here.

Q. Who was the candidate for premier?

A. Brownlee.

(Testimony of Doris H. Crews.)

Defendant's Exhibit No. 16—(Continued)

Q. Do you remember any of the other offices that were to be selected by that election?

A. Yes, George Hoadley was the minister of agriculture, and that is all I do remember.

Q. You say that is all you do remember?

A. I don't even remember what the opposition was now.

Q. Were all voters in the election required to be bona fide Canadian citizens?

A. Yes, naturally.

Q. And at that time were you exercising the rights of a Canadian citizen which you derived during minority through the naturalization of your father in Canada? A. Yes.

Q. Did you then vote to determine the selection of any dominion or local officers? A. No.

Q. Did you then vote to determine the adoption or legislation of any measure to decide a political issue in the dominion, provincial, or local governments?

A. In the provincial and local—in the provincial, yes.

Q. Do you remember what policy was at issue at that time?

A. No, to be frank, I don't.

Q. Do you remember in a general way about what it was?

A. Well, it was the ordinary party platform. It was our farmer platform, farmer premier at that

(Testimony of Doris H. Crews.)

Defendant's Exhibit No. 16—(Continued)

time. They believed in a low rate of taxation and much the same as your democratic government here, but any particular measure, I don't remember. It was just a general provincial election.

Q. Were any of the matters voted upon by you at that time for the purpose of determining sovereignty over foreign territory? A. No.

Q. Were local political offices determined by the results of that election also? A. No.

Q. It was strictly a provincial election, was it not?

A. Yes, you see, in Canada local politics—provincial politics does not control local politics near as much as it does here in the state of Washington.

Q. Do you remember of any other offices that were to be determined by the selection of individuals at that time other than those that you have mentioned? A. No, I do not.

Q. Did you ever vote in Canada at any other time? A. No.

Q. Have you ever held any political position in Canada? A. No.

Q. Were you ever employed by the Canadian government in any capacity? A. No.

Q. Have you ever taken an oath of allegiance to the Canadian government? A. No.

Q. Have you ever voted in any election in the United States? A. No.

Q. None whatever? A. None whatever.

Q. I believe you have stated heretofore that you

(Testimony of Doris H. Crews.)

Defendant's Exhibit No. 16—(Continued)

registered under the Selective Service Act of 1940, is that correct? A. Yes.

Q. Have you been classified? A. Yes.

Q. What is your present classification?

A. 1-A.

Q. Have you been called to report for service?

A. Yes, I was called on the 11th of November and then they postponed it. Here is my last call, and here is my classification card, and here is my registration card. (Presents order to report for induction dated November 17, 1942, addressed to William Wade Ricketts, order No. 10559, directing him to report for training and service in the army at the Armory, Spokane, Washington, at 7:45 a.m., on the 16th day of December, 1942.)

Q. Have you now pending any application for deferment? A. No. (Cards returned.)

Q. Is there anything else that you wish to state in connection with your case?

A. Yes, there is. I have been waiting to see what disposal you would make of my case, now that I'm going into the army, it doesn't make much difference. I'll see whether I'm taken or not, then I wish to apply for a visa or the necessary forms, I have waited this long to wait for you people to dispose of my case to see where I would stand. If you people have the authority to write me a visa here, I would like to do that. If I have to do it in Canada, I'd be willing to do so for legal reentry into the United States for the purpose of citizenship. I think that's all that is necessary.

(Testimony of Doris H. Crews.)

Defendant's Exhibit No. 16—(Continued)

Certified a true and correct transcript of my shorthand notes.

DORIS H. CREWS.

(Whereupon, there being no further questions, the witness was excused.)

JAMES E. SULLIVAN

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Erickson:

Q. Will you state your name, please?

A. James E. Sullivan.

Q. What is your position?

A. Immigrant Inspector, Immigration and Naturalization Service, stationed in Spokane.

Q. What was your connection with the Immigration Service on August 2, 1943?

A. The same.

Q. Were you acquainted with the plaintiff, William Wade [184] Ricketts? A. I am.

Q. Did you give Mr. Ricketts a hearing, or did your Service give Mr. Ricketts a hearing, on or about August 2, 1943? A. I did.

Q. And who was present at that hearing?

A. Mr. Ricketts and myself.

(Testimony of James E. Sullivan.)

Q. State whether or not Mr. Ricketts was placed under oath?

A. Mr. Ricketts was placed under oath.

Q. Where was the hearing?

A. In the Immigration office in the Welch Building.

Q. Did you make original shorthand notes at that time? A. I did.

Q. Do you have them with you?

A. I have.

The Court: What was this date, now?

Mr. Erickson: August 2, 1943.

The Court: The same date as the last one, wasn't it?

Mr. Erickson: No, the last one I mis-stated. The date was November 30, 1942, the actual date of the hearing.

The Court: Oh, I didn't correct my notes here.

(Whereupon, record of hearing held at Spokane, Washington, August 2, 1943, was marked Defendant's Exhibit No. 17 for identification.)

Direct Examination
(Continued)

Q. I will hand you Defendant's Identification No. 17, Mr. Sullivan, and ask you if identification 17 is an accurate typewritten transcription of your original shorthand notes? A. It is.

Mr. Erickson: I offer 17.

Mr. Young: I make the same objection.

The Court: It will be admitted.

(Testimony of James E. Sullivan.)

(Whereupon, Defendant's Exhibit No. 17 for identification was admitted in evidence.)

[Defendant's Exhibit No. 17 set out on pages 311 to 336.]

Direct Examination
(Continued)

Q. Mr. Sullivan, did you have any conversation with Mr. William Wade Ricketts, the plaintiff in this case, about filling out a form I-55?

A. I did.

Q. And do you know when that conversation took place?

A. On July 27, I believe it took place.

Q. Of what year? A. 1943.

Q. And what was the occasion of that conversation? How do you remember it?

A. Hearing was first started in his case on July 27th, and I informed him at that hearing that he had the right to apply, if he so desired, for the privilege of voluntary [186] departure from the United States in lieu of deportation, and if he so desired I would furnish him forms to make that application. He indicated he did wish to apply, and I presented him with those forms. The forms were presented prior to the hearing on August 3.

Q. I hand you Exhibit 2 and ask you if you are the same James E. Sullivan?

A. August 2 is when they were sworn to—I make a correction; that is my signature, and Mr. Ricketts' signature, signed in my presence.

(Testimony of James E. Sullivan.)

Q. Was there any conversation on your part with Mr. Ricketts about any prosecution?

A. He wasn't subject to prosecution.

Mr. Young: I move that be stricken as not being responsive.

The Court: The question is what conversation you had.

A. There was none.

Q. State whether or not you told Mr. Ricketts that he must fill out the form?

A. I did not; it was a voluntary act on his part.

Mr. Erickson: That's all.

Cross-Examination

By Mr. Young:

Q. Mr. Ricketts had at a time prior to this been incarcerated in jail for ten days? [187]

A. Mr. Ricketts was never incarcerated on this occasion.

Q. I say before; do you understand the question, before the date of the execution of this document, Exhibit 2, he had been?

A. Well, maybe some time time in the past. He wasn't in connection with this arrest.

Q. As a matter of fact, Mr. Ricketts is under bond right now, is he not?

A. Mr. Ricketts was released on his own recognizance at that time.

Q. At the present time he is under a bond or he would be in jail?

A. At the present time I understand he is under bond.

(Testimony of James E. Sullivan.)

Q. There is no question about his being under bond; it's a thousand dollar bond, isn't that correct?

A. I don't know, I haven't seen the bond.

Q. And he would be in jail if it were not for that bond? A. That's a conclusion.

Mr. Erickson: I suggest that is argumentative.

Mr. Young: Will it be stipulated he is out on bond?

Mr. Erickson: Oh, yes, we'll stipulate he is out on bond.

Mr. Young: That's all.

(Whereupon, there being no further questions, the [188] witness was excused.)

Mr. Erickson: We haven't any more testimony, and therefore rest.

The Court: Do you have any rebuttal, Mr. Young?

Mr. Young: I think that counsel will agree, if I can speak to him on a matter.

The Court: If you would like some time to look over these exhibits, we can recess and take up the argument this afternoon.

Mr. Young: What I had in mind was asking counsel to agree, but maybe it appears in the various documents, that the last time that my client was in Canada was subsequent to December 8, 1941, at a time when we were at war.

Mr. Erickson: Yes, that appears.

Mr. Young: I think it appears, but I want to be very certain that it is in the record. My point is that he could not do anything by way of ex-

(Testimony of James E. Sullivan.)

patriating himself subsequent to the time we were at war, because of the statute. I wonder if it would be convenient with the court, or agreeable, if I could take some of these exhibits and get off by myself somewhere? I prefer to do it in my office.

The Court: I have no objection to your withdrawing the exhibits over the noon recess, unless counsel for [189] the defendant wishes to examine them at the same time.

Mr. Erickson: No; I would like to have the court read them prior to the argument.

Mr. Young: I have gone through some of the exhibits, and there are some pertinent things that I wish to read to the court, or have the court have in mind.

The Court: I have read as we have gone along here all the exhibits except these last ones. I think there are about perhaps four or five of the last statements that I haven't read.

Mr. Young: Maybe it would be better if the court read them rather than me.

The Court: Unless you wish to take them and have them back here by 1:30. I think if we are going to do that, though, we had better take up the argument in this case at 2:30. That will give us time to conclude the case this afternoon, I assume. I shouldn't think we would require more than three hours for argument. I think we had better take up this case again at 2:30.

(Whereupon, the Court took a recess in this cause until 2:30 o'clock p.m.)

Spokane, Washington, October 1, 1946,
2:30 o'clock p.m.

(All parties present as before, and the trial was resumed.) [190]

Mr. Young: Your Honor, I have some additional testimony, in view of examination of the Exhibits, 14 to 17, which is in the nature of rebuttal, and it may be partially in the nature of corroborative testimony in the case in chief.

The Court: Very well, you may put it on.

GEORGE FORBES

called as a witness on behalf of the plaintiff, in rebuttal, being duly sworn, testified as follows:

Direct Examination

By Mr. Young:

Q. Your name is George Forbes?

A. Yes, sir.

Q. And where do you live?

A. 807 West Dalton.

Q. What is your business? A. Barber.

Q. Do you know William Wade Ricketts, the plaintiff in this case? A. Yes, sir.

Q. When did you first become acquainted with him? A. In July, 1926.

Q. In July, 1926? Where?

A. Oh, a little ways north of Marcus, in a logging camp.

(Testimony of George Forbes.)

Q. In the State of Washington?

A. In the State of Washington. [191]

Q. What was the circumstances of your becoming acquainted with him? Just state it briefly to the Court.

A. I remember when he first come into the camp, it was after the 4th of July, and he worked in the camp, and we got called out on a forest fire. I remember we went out on the same truck.

Q. Did you live in the same bunkhouse with him?

A. Lived in the same bunkhouse with him.

Q. Did you have occasion to discuss his claims of citizenship? You can answer that yes or no.

A. Yes.

Q. What, if anything, was said by him to you with respect to his claim of citizenship at that time?

A. Well, the reason it came up, I didn't have my own papers at that time, and we talked about it.

Q. Were you a Canadian citizen or a British subject? A. British subject.

Q. And did you discuss your situation with him?

A. Well, we brought it up once in a while, yes. I had to go through that, and he said "I don't have to worry, I'm an American citizen."

Q. I see; and that's the way the discussion came about? A. That's the way.

Q. And that was at Marcus in 1926, during the month of July, is that correct? [192]

A. That is correct.

Mr. Young: You may inquire.

(Testimony of George Forbes.)

Cross-Examination

By Mr. Erickson:

Q. Did he tell you that he was born in the United States, or that he was an American citizen, do you remember?

A. No, as far as that goes he didn't mention any of that.

Q. He didn't tell you where he was born?

A. No, sir.

Q. Did he tell you how long he had been in the United States?

A. Oh, we didn't carry on no—no, I wouldn't say that he didn't say.

Q. Was that the first time you had seen him, there in this forest fire?

A. That's the first time.

Q. You had only seen him a few days before that? A. Oh, we worked in camp, yes.

Q. Well, how long did you work together in camp?

A. It was during the month of July.

Q. Oh, just during the month of July, 1926?

A. 1926.

Q. Have you seen Mr. Ricketts continuously from that time, July, 1926, until the present time?

A. In Spokane here at different whiles, you know.

Q. You have kept up your acquaintance with him all the time? [193]

A. Yes, that's right. He come to see me. I was

up on Washington street, and he'd drop in to see me during those years. I was up there for eight years.

Mr. Erickson: That's all.

(Whereupon, there being no further questions, the witness was excused.)

WILLIAM WADE RICKETTS

the plaintiff. recalled as a witness in his own behalf, in rebuttal, testified as follows:

Direct Examination

By Mr. Young:

Q. Mr. Ricketts, in Defendant's Exhibit 17 you were asked some questions concerning your intention of residing permanently in the United States when you first came here from Canada after your removal as a youth to Canada by your father. Do you understand what I mean? A. Yes.

Q. And I believe you answered to the effect that it was not your intention to remain permanently here in the State of Washington, or in the States, is that correct?

A. I do not remember making a statement to that effect. If I did, it is not true.

Q. Well, now, who came with you from Canada on that occasion? A. My wife came with me.

Q. Your wife came with you; did you have a family? A. I had one child.

(Testimony of William Wade Ricketts.)

Q. I believe this may be repetition, but briefly, where did [194] you take up your residence here in Spokane?

A. At the Ensley Apartments on Pacific Avenue in Spokane.

Q. What was the cause of your removal back to Canada? What caused you to go back in Canada?

A. On account of my wife's health, she was unable to live in this low climate, and in the spring she begged me to go back to Canada, which I did.

Q. Was it your intention to remain permanently in the United States at that time? A. Yes.

Q. Now, with respect to Exhibit 17, you made certain admissions in response to questions, the chief of which were that you were a citizen of Canada.

The Court: Pardon me; this time that he lived in the Ensley Apartments, was that his first trip?

Mr. Young: His first trip back after being taken away as a child.

Direct Examination
(Continued)

Q. Now, at the time you gave the answers to questions that are contained in Exhibit 17, state whether or not you had a discussion or an understanding or whatever it was with Mr. Sullivan with respect to what would be the best procedure to take in your case? A. I had an understanding?

Mr. Erickson: Just a minute; I object to that. I think it is repetition. It's been gone into previously.

(Testimony of William Wade Ricketts.)

The Court: Read the question.

(Whereupon, the reporter read the last previous question.)

The Court: I'm not sure whether that's been gone into as to this particular exhibit or not. He's explained most of them.

A. Yes, I did have an understanding with Mr. Sullivan.

Q. What was that?

A. The understanding was to answer the questions in this application for voluntary departure. Mr. Sullivan agreed to cooperate with me to obtain a visa and re-enter the country legally the easiest way possible. I had an understanding with Mr. Sullivan to that effect. The first thing I had to do was fill out this form according to the questions listed, to obtain permission to depart to Canada voluntarily.

Q. State whether or not at the time you answered these questions contained in Exhibit 17 with respect to your claim of citizenship you believed that you had to have a citizenship in some country in order to secure a visa for entry into this country?

A. I did.

Mr. Erickson: I object to that. It is leading.

The Court: Well, I think it is leading, but he's testified to that before.

Mr. Young: I had a "whether or not" in there, but I don't know whether that cured it.

(Testimony of William Wade Ricketts.)

The Court: That doesn't always take the curse off a leading question.

Direct Examination
(Continued)

Q. In Exhibit 17 you answered questions to the effect that you did not intend, or that you intended to be a citizen, to become a citizen of Canada after your attainment of twenty-one years. You answered some questions to that effect. State whether or not that was a fact, that you did intend to become a citizen of Canada?

A. I did not intend to become a citizen of Canada.

Cross-Examination

By Mr. Erickon:

Q. Well, Mr. Ricketts, when were you married?

A. I was not married.

Q. I thought you brought your wife down?

A. I had a common law wife.

Q. Well, when did you consider that you entered into the common law marriage in Canada?

A. February 28, 1923.

Q. In what Province?

A. Province of Saskatchewan.

Q. And was your common law wife a Canadian?

A. Yes. [197]

Q. And you had some children born in Canada?

A. Yes.

Q. How many? A. Two.

Q. And you brought them down with you to the Ensley Apartments?

(Testimony of William Wade Ric

A. I brought one, the younger

Q. And what happened to the you leave him in Canada?

A. No, I only had one child in

Q. One died previously?

A. No, that was the younger c was born subsequently.

Q. Then when you departed Apartments to Canada you took th

A. That's right.

Q. And from 1926 on, you nev wife or children back to the State Canada.

A. From the spring of 1927 o was here with me until the spring

Q. She stayed in Canada with

A. No, she stayed here in Spo

Q. Then you brought her back Spokane? A. Yes.

Q. From that time on you nev wife or children [198] back to the

A. That's right.

Q. And when did you come ba

(Testimony of William Wade Ricketts.)

A. They are still in Canada.

Q. And did you intend to leave them in Can

A. Yes.

Q. You were still married to your common wife in Canada?

A. No, we had been separated a good many y previous to that.

Q. Are your children still minors?

A. Yes.

Q. They are still in Canada?

A. Yes.

Q. And you haven't tried to bring them int United States? A. No.

Mr. Erickson: That's all. [199]

Redirect Examination

By Mr. Young:

Q. The children are with their mother, are not? A. They are.

Q. And you have been contributing to support? A. That's right.

Q. And have they expressed any desire to into the United States? A. They have

Q. Now, just so we get the common law cha

(Testimony of William Wade Ric

Q. And lived together as such?

A. As such.

Q. How long before the first cl

A. A period of three or four y

Mr. Young: I wonder if counse the Province of British Columbia doctrine of common law marriag katchewan?

Mr. Erickson: I have no kno don't [200] know, but Mr. Moon do not.

The Court: The Court doesn't k the Court does not take judicial n laws.

Mr. Young: I don't know eithe that there was a doctrine of comm prevailing in Saskatchewan. It n

The Court: Of course, we ar with whether this man was legally only insofar as it may have a bear tions and actions, and be explanato in this case.

Mr. Young: I had in mind the

Mr. Erickson: I would like to call Mr. Sul back again.

JAMES E. SULLIVAN

recalled as a witness on behalf of the defenda sur-rebuttal, testified as follows:

Direct Examination

By Mr. Erickson:

Q. You are Mr. John Sullivan? [201]

A. James Sullivan.

Q. Who testified here before in this case?

A. Yes.

Q. I am asking you with regard to defend Exhibit 17, as to whether or not you had any versation with Mr. Ricketts in regard to his an ing the questions in that exhibit, and if so, ex what the conversation was?

A. I don't understand just exactly what have reference to.

Q. Well, let me explain it. Did you have conversation with Mr. Ricketts about him compelled to answer the questions?

A. No, there was nothing so far as compu

(Testimony of James E. Sullivan.)

A. This hearing, after the hearing was completed the findings were made and served on Mr. Ricketts. He still has a copy, I presume. They were forwarded to Washington, D. C., Board of Immigration Appeals. They in turn made [202] decision that granted voluntary departure. I had no power or authority to promise or in any way to indicate that that would be granted. However, I did recommend that that be granted, and I told him that I would recommend it.

Mr. Erickson: That's all.

Cross-Examination

By Mr. Young:

Q. You did as a concluding matter in this examination say: "The hearing in this case will be adjourned at the present time to a future date, in lieu of deportation, in order that a character investigation may be conducted in your case. You will be notified when to appear." You did make that statement to him?

A. That's right, and the hearing was continued at a later date.

Q. And you did, prior to or during the making of the examination, explain to him the benefits of voluntary departure?

A. Certainly, that's a requirement.

Mr. Young: That's all.

(Whereupon, there being no further questions, the witness was excused.)

Mr. Erickson: That's all our testimony in surrebuttal.

(Whereupon Mr. Young made a closing address to [203] the Court on behalf of the plaintiff, and Mr. Erickson made a closing address to the Court on behalf of the defendant.)

The Court: I think I will announce my opinion orally in this case tomorrow morning at ten o'clock. I would like also to look at some of these cases again and go over my notes, and perhaps look at some exhibits. While I am not going to take the case under advisement, I will simply announce my opinion orally at ten o'clock.

(Whereupon, the Court took a recess in this cause until October 2, 1946, at 10 o'clock a.m.)

Spokane, Washington, October 2, 1946
10 o'Clock A.M.

The Court: The Court will now announce its decision orally in the case of William Wade Ricketts against the Attorney General of the United States.

As was brought out here in argument, I think it was by the United States Attorney, there was a case, the Reid case, decided by the Ninth Circuit Court of Appeals, that would have been determinative of this case. It was decided, as I recall, about 1934. It held that under these circumstances the plaintiff would have lost his American citizenship upon the naturalization of his father in Canada during his minority, and of course that would have

settled the proposition, because then it would have been incumbent upon the plaintiff to have re-acquired his American citizenship by some method or other in accordance with the provisions of law. But that case insofar as it did hold what I have just stated, was virtually overruled by the case of Perkins vs. Elg, 307 U.S. 325, which was decided by the Supreme Court of the United States in 1939, just prior to the adoption of the new statute which has now settled this sort of question. It appears in 8 U.S.C.A., Section 801.

So that as I see it, the principles by which the [205] Court must be governed in this case are set out in the Perkins vs. Elg case, and that case is controlling here insofar as the rules to be followed are concerned. The opinion of the Circuit Court of Appeals in the Reid case was based in part, at any rate, upon the opinion of the Attorney General in the Tobiasen case, and the Supreme Court of the United States expressly repudiated the Attorney General's opinion in that case in the opinion in the Elg case, and instead adopted a series of rulings and directives and statements of principle in letters covering a period of years issued by the State Department of the United States.

In the well-reasoned opinion, Justice Hughes, who wrote the opinion, Chief Justice Hughes, adopted the principles set out in these various rulings and directives, and it is there, it seems to me, that we must find the rule and the measures to apply here.

It was held there that Miss Elg, who was the subject of the decision, had not lost her American

citizenship by virtue of her parents having returned to their native land during her minority and reassumed their nationality there. However, the Elg case, I think, is clearly distinguishable from this case in its facts, because Miss Elg made inquiry at an American consulate just prior to reaching her 21st birthday as to whether [206] or not she could retain her American citizenship which she had acquired by her birth. She was advised that she could do so, and within eight months returned from Norway or Sweden, at any rate one of the Scandinavian countries, and returned to the United States. Of course, the promptness and reasonableness of the time within which a person acts in a case of this character must be judged by the circumstances, and one of the circumstances would be the distance in which they find themselves removed from the United States, and the difficulty and expense of returning, which would be greater from Europe than coming across the line from Canada, where the countries are contiguous and there is very little difficulty or expense.

Now, the principle, as I see it, in Perkins vs. Elg, is this: Of course, it is conceded, and it is no longer open to controversy, that a person born in the United States thereby acquires American nationality, whether or not the parents are foreigners or whether or not they are capable themselves of acquiring American citizenship. There are some exceptions to that, of course, but they are not material here. If, however, during minority, a child who is born in this country is taken by its parents

to a foreign country, where the parents either by becoming naturalized in a foreign [207] state or by resuming a natioality which they formerly had there become subjects or citizens of that country, then under its laws the foreign state may have claim to nationality of the child, and in that case, under our law as it was announced in Perkins vs. Elg, that child has a dual nationality. The theory is that it is unfair to a minor, who must of necessity be domiciled with the parent if the parent so desires, and must go with the parent to a foreign country in obedience of the law, that it is unfair to have their birth-right of nationality taken from them without any voluntary act on their part, or without giving them opportunity to make a choice, so that the principle we apply is that there is a dual nationality there until the child becomes twenty-one years of age, and is in a position to make a choice for himself, but upon becoming twenty-one years of age, then that person may elect either to retain American citizenship or American nationality, or to adopt the nationality which it has acquired by virtue of the actions of its parents, the naturalization of its parents.

I think it is inherent in the reasoning of Perkins vs. Elg that that dual citizenship may not continue indefinitely after the person involved reaches majority. It is only permitted to exist during minority because that person has no right of free choice. As soon as the [208] right of free choice comes into existence, on the arrival of the person at majority, then an election must be made, one way or the other,

within a reasonable time. A person can't indefinitely continue to be a citizen or subject of two countries.

The principles that govern here are not as clearly stated as applied to these facts as one might wish, in Perkins vs. Elg, but I think there is a good deal in that opinion that throws light on the situation here. On Page 329 of the Perkins vs. Elg opinion, the Court says:

> "It has long been a recognized principle in this country that if a child born here is taken during minority to the country of his parents' origin, where his parents resume their former allegiance, he does not thereby lose his citizenship in the United States provided that on attaining majority he elects to retain that citizenship and to return to the United States to assume its duties."

It does not seem to me there is any distinction in principle between a situation where the parents, we will say, as in the Elg case, were originally subjects of a foreign state, in that case subjects of Sweden, come to this country and are naturalized, a child is born to them, then they take the child back to Sweden, and by virtue of residence resume their allegiance and nationality of [209] Sweden, than one we have here, where the parents were American, a child was born in America and then taken to a foreign state, where the parents, during the minority of the child, by naturalization acquired a foreign nationality. It seems to me there would be no difference in principle at least in this case,

because there is, as has been brought out here, the statute of Canada which is mentioned and set out in the Reid case, under which, under these circumstances, the plaintiff, so far as the laws of Canada were concerned, at any rate, acquired the status of a subject of Great Britain upon naturalization of his parents during his minority.

Now, on page 332 of the opinion in Perkins vs. Elg, in referring to a ruling of the Secretary of State, the Court says, quoting from that ruling, which was an opinion of 1888:

> "But the general view held by this Department is that a naturalized American citizen by abandonment of his allegiance and residence in this country and a return to the country of his birth, animo manendi, ceases to be a citizen of the United States; and that the minor son of a party described as aforesaid, who was born in the United States during the citizenship there of his father, partakes during his legal infancy of his [210] father's domicile, but upon becoming sui juris has the right to elect his American citizenship, which will be best evidenced by an early return to this country."

Then again, on page 333, quoting from another ruling of the State Department:

> "Although there is no express provision in the law of the United States giving election of citizenship in such cases, this department has always held in such circumstances that if a child is born of foreign parents in the United States, and is taken during minority to the country of

his parents, such child, upon arriving of age, or within a reasonable time thereafter, must make election between the citizenship which is his by birth and the citizenship which is his by parentage. In case a person so circumstanced elects American citizenship, he must, unless in extraordinary circumstances, in order to render his election effective, manifest an intention in good faith to return with all convenient speed to the United States and assume the duties of citizenship."

The writer of the opinion, Mr. Chief Justice Hughes, quotes at length these various rulings and directives [211] of the State Department. I am not going to read them all, of course, but on page 344 is another excerpt:

"The term 'dual nationality' needs exact appreciation. It refers to the fact that two States make equal claim to the allegiance of an individual at the same time. Thus, one State may claim his allegiance because of his birth within its territory, and the other because at the time of his birth in foreign territory his parents were its nationals. The laws of the United States purport to clothe persons with American citizenship by virtue of both principles."

"It thus becomes important to note how far these differing claims of American nationality are fairly operative with respect to persons living abroad, whether they were born abroad or were born in the United States of alien parents and taken during minority to reside in the

territory of States to which the parents owed allegiance. It is logical that, while the child remains or resides in territory of the foreign State claiming him as a national, the United States should respect its claim to allegiance. The important point to observe is that the doctrine of dual allegiance ceases, in American [212] contemplation, to be fully applicable after the child has reached adult years. Thereafter, two States may in fact claim him as a national. Those claims are not, however, regarded as of equal merit, because one of the States may then justly assert that his relationship to itself as a national is, by reason of circumstances that have arisen, inconsistent with, and reasonably superior to, any claim of allegiance asserted by any other State. Ordinarily the State in which the individual retains his residence after attaining his majority has the superior claim. The statutory law of the United States affords some guidance but not all that could be desired, because it fails to announce the circumstances when the child, who resides abroad within the territory of a State reasonably claiming his allegiance, forfeits completely the right to perfect his inchoate right to retain American citizenship. The department must, therefore, be reluctant to declare that particular conduct on the part of a person after reaching adult years in foreign territory produces a forfeiture or something equivalent to expatriation.

"The statute does, however, make a distinction [213] between the burden imposed upon the person born in the United States of foreign parents and the person born abroad of American parents. With respect to the latter, Section 6 of the Act of March 2, 1907, lays down the requirement that, as a condition to the protection of the United States, the individual must, upon reaching the age of 18, record at an American consulate an intention to remain a citizen of the United States, and must also take an oath of allegiance to the United States upon attaining his majority.

"The child born of foreign parents in the United States who spends his minority in the foreign country of his parents' nationality is not expressly required by any statute of the United States to make the same election as he approaches or attains his majority. It is, nevertheless, believed that his retention of a right to demand the protection of the United States should, despite the absence of statute, be dependent upon his convincing the department within a reasonable period after the attaining of his majority of an election to return to the United States, there to assume the duties of citizenship. In the absence of a definite statutory requirement, it is impossible [214] to prescribe a limited period within which such election should be made. On the other hand, it may be asserted negatively that one who has long manifested no indication of a will to make such an

election should not receive the protection of the United States save under the express approval of the department."

Now, it seems to me that under the principles announced in the Elg case, that it was incumbent upon the plaintiff here, upon reaching his majority, to within some reasonable time make an election as to whether he wanted to be a subject of Great Britain or a citizen of the United States, and that if he had remained in Canada for an extended period of time without making any election, that it would have to be assumed his election was to retain his nationality there, in the absence of some other action on his part indicating an election.

The statute which was enacted in 1940 of course is not applicable here, but it is interesting to note that had it been in effect at the time the plaintiff reached his twenty-first birthday, he would not be entitled to American citizenship, because then he would have had to make his election before he was twenty-three years of age, and it seems to me it is some indication [215] of what Congress at the time of enacting that Statute regarded as a reasonable time when they placed it, as an outside limit, as two years.

In this case the plaintiff, Mr. Ricketts, upon arriving at his twenty-first birthday, didn't do anything, as I recall the testimony, except the declaration to which his uncle testified, and I will refer to that in a moment, he didn't make any move to return to the United States until about two years and eight months after reaching his majority. He was

born in the United States in 1902, removed to Canada in 1910, his father became naturalized in Canada December 31, 1914, during the minority of the plaintiff, of course, and the plaintiff first returned to the United States, according to my notes, in October or November of 1925, at a time when he was about twenty-three years and eight months of age. He stayed at that time for six months in Spokane here, then went back to Canada for about an equal period, according to his testimony, at least on direct examination, then came back to the United States in the fall of 1926 and remained on that occasion four or five months, living in a different place in Spokane, and returned to Canada in the spring of 1927, and remained in Canada then until the year 1936, when he came back to Twisp.

Now, it is true that his uncle did testify that [216] he visited the home of the plaintiff in Canada, and that the plaintiff told him he considered himself an American, and intended to return to the United States, and the uncle said he thought, he wasn't sure, but he thought, he was about twenty-one years of age, but his best recollection as to the time when he made this visit was 1920 or 1921, which would be during the minority of the plaintiff, so at least there is so much doubt on that point that the Court could not find from that testimony that the plaintiff, after reaching his twenty-first birthday, made that declaration to the uncle. The weight of the testimony seems to be to the contrary. Declarations during minority may have some probative value as to what a person intends to do when they become of age,

but if it be so considered, it is at least counteracted, it seems to me, by the fact that the plaintiff during his minority held elective public office in Canada in connection with some school district or school matter there.

Now, just looking at this matter, it doesn't seem to me that these later declarations, made after controversy developed, are of very much value one way or the other. Of course, as to statements as to what his nationality was, I don't think the plaintiff could be expected to know. It is a very close and difficult question for attorneys and the Court to decide, as to [217] what his nationality was under the peculiar circumstances here, so that his opinion as to what his nationality might be would be of very little value, and his statement that he was a Canadian, not a Canadian citizen but a subject of Great Britain, a resident of Canada, in these later proceedings must be taken in connection with his testimony, I think, that he was trying to get back into Canda to make a legal entry and to get back here and get naturalized. He was trying to follow the procedure best adapted. They would only be material in throwing light on what his intentions were, and what election he made or must be assumed to have made within a reasonable time after becoming twenty-one. I don't think he could wait to make an election for ten, or even five years, or any considerable length of time, so the important thing is to determine what his intentions were as judged by his actions and his conduct at the time and shortly after he reached his twenty-first birthday.

As I say, he didn't come back to the United States, although it is not far. It wouldn't be difficult to do if he were staying in Canada only because he was required to, because his father was a subject of Great Britain and he had to live where his father did. He could very easily have immediately come back when he became twenty-one. He didn't do that. He waited two [218] years and eight months. If he had then come to the United States and established permanent residence we would have a different question. I think I would be inclined that that period was not unreasonable in which to make his election; but when he came down here, I don't think under the circumstances, because he now says he intended to establish permanent residence, that we can say he did intend that. The best indication is what he did, and what he actually did was stay here six months, go back for an equal period, come back for four or five months, and then go back and live in Canada nine years. For the first thirteen years the plaintiff only resided in the United States for eleven months, according to his own testimony, out of the first thirteen years following his majority.

Under those circumstances we can't say he did establish permanent residence or assume the duties of citizenship, or show his intention of assuming the duties of citizenship, prior to 1936, which was too long, it seems to me, for him to make an election.

We have the added circumstance that during the long period that he returned to Canada after his second visit here, he voted in a general election in Canada. The record doesn't show he ever voted in a

general election in the United States. I think it shows he voted [219] in some municipal matter at Twisp, but never in a general election in the United States. He did so in Canada.

Taking all of the circumstances into consideration, the Court feels constrained to hold, under the principles announced in Perkins vs. Elg, that the plaintiff in this case did not make an election to retain his American citizenship, and his petition, or the prayer in his petition, for declaratory judgment declaring him to be a citizen or national of the United States will be denied.

Mr. Young: Now, your Honor, my client is out on bond. I assume there will have to be some findings of fact, conclusions of law, and judgment entered, and I assume this bond he is under may be continued?

The Court: Yes, that may be done for any reasonable period until the case is finally concluded. You have no objection to that?

Mr. Erickson: No, I have no objection to that.

The Court: I think there should be findings. They will have to be prepared, presented and settled. In the meantime the plaintiff's bond may stand the same as it did before the announcement of the court's decision. [220]

REPORTER'S CERTIFICATE

United States of America,
Eastern District of Washington.

I, Stanley D. Taylor, do hereby certify:

That I am the regularly appointed, qualified and

acting Official Court Reporter of the District Court of the United States in and for the Eastern District of Washington.

That as such reporter I reported in shorthand the trial of the above-entitled cause before the Hon. Sam M. Driver, United States District Judge for the Eastern District of Washington, sitting at Spokane, Washington, on September 30, October 1 and October 2, 1946; that the above and foregoing is a full, true and correct transcript of the stenographic notes taken by me of the proceedings had therein, and that the same contains all objections made and the Court's ruling thereon.

Dated at Spokane, Washington, this 5th day of April, 1947.

/s/ STANLEY D. TAYLOR,
Official Court Reporter.

[Endorsed]: Filed April 7, 1947. [221]

DEFENDANT'S EXHIBIT No. 2

Form No. I-55

U. S. Department of Justice
Immigration and Naturalization Service

Central Office File No. 55973/230
Alien Registration No. 5959545
Field File No. 9012/7999

General Information Form

The information requested of you in this form is required to assist the Government in deciding upon your application. Your application cannot be granted unless you cooperate with the Government by giving this information as completely as you can. You must file with your application two copies of this form filled out and sworn to before a notary public or an immigrant inspector.

If you wish, you may take an extra copy of the form to use while you are securing the information. Then, when you are sure that you have answered all the questions clearly on this sample form, you may copy your answers on the forms which are to be filed.

Any immigration officer or the representative of any social service agency will be glad to explain the questions to you and assist in filling out this form. The answers to the questions, however, must be your own answers and not those suggested to you by any other person. If you do not have room to answer certain of the questions in the space provided, you will find two blank sheets at the end of the form

Defendant's Exhibit No. 2—(Continued)

on which you may also write. If you write on these blank sheets, however, be sure to give the number or numbers of the questions which you are answering.

Be sure to answer every question. If you do not know the answer to certain of the questions and cannot find out, write "I do not know," and then explain why you cannot secure the information.

Your attention is called to section 22 (c) of the Immigration Act of 1924, which provides that whoever knowingly makes under oath any false statement in any application, affidavit, or other document required by the immigration laws or regulations prescribed thereunder, shall, upon conviction thereof, be fined not more than $10,000 or imprisoned for not more than 5 years, or both. Your answers to any of the questions in this form may be used as evidence in any proceedings to determine your right to enter, reenter, pass through, or reside in the United States. False answers to any of the questions may result in the denial of your application.

1. (a) What is your name? William Wade Ricketts.
   (b) Under what name did you last enter the United States? William Wade Ricketts.
   (d) By what names have you also been known? (Include professional names or any other names by which you have been known.) Ward Richards, Walter Richards.

Defendant's Exhibit No. 2—(Continued)

2. Have you been registered and fingerprinted in accordance with the provisions of the Alien Registration Act, 1940? Yes. If so, what is your alien registration number? Not yet received.

3. (a) At what address in the United States are you living at present? 110 N. Division St., Spokane, Wash.

   (b) What is your present permanent residence (either in the United States or in a foreign country)? (If you have no permanent residence write "None.") 110 N. Division St., Spokane, Wash., U.S.A.

   (c) What is your present post-office address in the United States? 110 N. Division St., Spokane, Wash.

4. (a) What is your race? White.

   (b) In the following indicated spaces state your sex, height, weight, color of hair and eyes, and visible distinctive marks, if any: Male; Height, 5 feet 8½ inches; weight, 146 lb.; Brown hair; Grey eyes; distinctive marks, crushed right index finger.

5. (a) When were you born? Feb. 3, 1902.

   (b) Where were you born? In or near the town or city of Hydro in the province or state of Oklahoma in the country of U.S.A.

6. (a) Of what country are you a citizen or subject? Canada (British Subject).

   (b) How did you acquire your present citizenship? (Check in appropriate square.) By

Defendant's Exhibit No. 2—(Continued)

birth ☐: Naturalization ☐: Otherwise [x] acquired my Canadian Citizenship through my fathers Naturalization in Canada while I was a minor child.

(c) If you are a naturalized citizen of any country, state the place and date of your naturalization: N. Battleford, Sask., July 15, 1915.

7. Have you previously been a citizen of any other country? Yes. If so, list on table below the country or countries of which you have been a citizen, the periods of your citizenship in each and the methods by which you acquired such citizenship.
Country—U.S.A.
Period of Citizenship—From 1902 to 1910.
Method of Acquiring Citizenship—Birth.

8. (a) What is your father's full, true name? Seigle Ricketts.
(b) Where was he born? Redoak, Iowa, U.S.A.
(c) When was he born? June 22, 1863.
(d) Where does he now live? Not living.
(e) Of what country is he at present a citizen? (was)—Canada.

9. (a) What is your mother's full, true name? Emma Shepard.
(b) Where was she born? Peoria, Ill., U.S.A.
(c) When was she born? March 16, 1871.
(d) Where does she now live? Not living.

Defendant's Exhibit No. 2—(Continued)

(e) Of what country is she at present a citizen? (Was) Canada.

10. In what places have you resided for more than 1 year at a time since the time of your birth?

City or Town	Province or State	County	From Month	From Year	To Month	To Year
Hydro	Okla.	U.S.A.	Feb.	1902	July	1910
Mullingar	Sask.	Canada	July	1910	Dec.	1925
Ensign	Alta	Canada	Dec.	1925	Oct.	1934
Airdrie	Alta	Canada	Oct.	1934	July	1936

(If needed, use blank sheet at the end of form and mark your answer "Question 10")

11. In the table below, state the facts concerning all of your entries into and departures from the United States. If you cannot remember the exact date of an entry or a departure, give the closest approximation.

Be sure in all cases to list your first and last entries into the United States.

List, also, all other entries and departures which you have made, with the following exceptions:

(a) List only such trips to Canada or Mexico in which you were out of the United States more than 1 month;

(b) If you are or have been residing in Canada or Mexico and have made short visits to the United States, list only those visits in which you were in the United States more than 1 month.

(c) If you are or have been a seaman, list only the first and last of your entries into or departures from the United States as a seaman. Be sure to list all other entries and departures, however.

In all cases in which you omit to list entries and departures under exceptions (a), (b), and (c) above, explain in general the nature, period, and frequency of such entries and departures in the space provided below the table.

ENTRIES INTO THE UNITED STATES

Place of entry into United States	Means of transportation (If by ship give name. If you cannot remember name of ship, give name of steamship line)	Approximate date of entry (Be as accurate as possible)			Were you inspected and admitted by immigrating officers? (answer yes or no	State (yes or no) whether you were in possession of passport If "yes" state place of government which issued passport	State whether you were in possession of immigration visa, nonimmigrant visa, transit certificate, limited entry certificate, permit, or like document, or if other document, describe	State whether you traveled as passenger or if otherwise, state how	Were you admitted as permanent resident, visitor, in transit, government official, student, treasury, merchant seaman, or if otherwise (state how	Place of departure from the United States	Destination (country)	Means of transportation (If by ship give name. If you cannot remember name of ship give name of steamship line)	Approximate date of entry (Be as accurate as possible)			State (yes or no) whether at the time of your departure you intended to reside permanently abroad
(a)	(b)	Month	Day	Year	(c)	(d)	(e)	(f)	(g)	(h)	(i)	(j)	(k)	Month	Day	Year	(l)
Eastport, Idaho	Spokane Int R R	June	12	1926	Yes	No	None	Passenger	Visitor	Eastport, Ida	Vancouver, B C	Spokane Int. R R	July	22	1926	No
Eastport	Spokane Int R R	Dec	15	1926	Yes	No	None	Passenger	Visitor	Eastport, Ida.	Blackie, Alta	S I R R.	Mar	31	1927	Yes
Oroville, Wash.	Greyhound Bus	Sept	10	1936	Yes	No	Limited Entry Cert	Passenger	Visitor	Oroville, Wn.	Ensign, Alta	Private Auto	June	1	1937	No
Cascade, Wn.	Auto Passenger	June	17	1937	Yes	No	Limited Entry Cert	Auto Passenger	Visitor	Blaine, Wn.	Kamloops, B C	Private Auto	Oct	27	1937	No.
Babb, Mont	Walking	Dec	6	1939	No	No	None	Walked across line alone	No	Blaine, Wn.	Vancouver, B C.	Bus Line	June	17	1938	No

DEPARTURES FROM UNITED STATES

Explain here the nature, period, and frequency of entries and departures omitted under exceptions (a), (b), and (c) of the instructions at the top of the page. If necessary use blank sheets at end and mark your answer Question 11.

Defendant's Exhibit No. 2—(Continued)

15. Since you last entered the United States, have you applied for an immigration visa for the purpose of residing permanently in the United States? No.

16. (a) Are you in possession of a passport? No.

(b) If you have no valid passport, or if your passport will expire within 60 days from the date you file this form, have you applied for the issuance or renewal of a passport? No.

17. Have you ever been debarred from entry into the United States or been deported, or required to depart from the United States in lieu of deportation, or been, to your knowledge, the subject of an investigation by the immigration authorities? Yes.

If your answer is in the affirmative, explain the circumstances fully in the following space: Entered the U. S. A. June 1937 at Cascade, Wn., on visitors permit, started in business in Twisp, Wn., and decided to remain permanently. Wrote superintendent of immigration Wycoff of Spokane and also went to see him personally and he sent me to the American Consul at Vancouver, B. C.

I was refused a visa because I had no birth certificate at that time and also on the grounds that I would become a public charge. I subsequently entered the U.S.A.

Defendant's Exhibit No. 2—(Continued)

illegally was arrested, jailed & deported, June 16th, 1938.

18. (a) Are you married ☐; single ☐; widowed ☐; divorced [x]; married but separated ☐? Check in appropriate square.)

19. List on table below the facts requested as to all of your marriages (including your present marriage) and give the citizenship status (during the period you were married to them) of each of your wives or husbands.

(a) Name of husband or wife—Edith B. Ryan Ricketts.

(b) Date of marriage—Oct. 31, 1940.

(c) Approximate date of dissolution of marriage—Apr. 1st, 1942.

(d) How was marriage dissolved: By death, divorce, annulment, or otherwise? Divorce.

(e) Place of dissolution of marriage—Spokane, Wn.

(f) Country of citizenship of husband or wife during marriage. U. S. A.

(g) How did husband or wife acquire such citizenship: Birth, naturalization, or otherwise?—Birth.

(h) Approximate date on which citizenship was acquired—Sept. 12, 1900.

20. If you have any living children by any of your marriages, state their names, ages,

Defendant's Exhibit No. 2—(Continued)

places of birth, and places of residence in the following table. In the last column state (Yes or no) whether or not each child is totally dependent upon you for support. If any child is only partially dependent upon you, write "In part" in the last column of the table and explain below. If any of your children are attending school in the United States, list below the names and addresses of the schools. None. Explain here the amount you are contributing to the support of any child or children who are partially, rather than totally, dependent upon you. None.

21. What brothers, sisters, aunts, uncles, or first cousins have you in the United States?

Name—Wayne C. Ricketts.
Address—Winlock, Wn.
Relationship—Brother.
Country of Citizenship—U. S. A.

22. What brothers, sisters, aunts, uncles, or first cousins have you living abroad?

Name	Country Where Living	Relationship	Country of Citizenship
Clyde E. Ricketts	Canada	Brother	Canada
Boyd C. Ricketts	Canada	"	Canada
Noel G. Ricketts	Canada	"	Canada
Forrest G. Ricketts	Canada	"	Canada
Roy R. Ricketts	Canada	"	Canada
Claude K. Ricketts	Canada	"	Canada
Grace E. Ricketts	Canada	Aunt	Canada

Defendant's Exhibit No. 2—(Continued)

23. Give the names and addresses of three of your close friends in the United States:

Name	Address
Melvin C. Roberts	Globe Hotel, Spokane, Wn.
Mr. Harrold Gubbser	Gubby's Food Market, Spokane
Mr. Albert Cull	Sherwood Bldg., Spokane

24. What educational institutions have you attended?

Name of Institution	Address
Public School	Hydro, Oklahoma
Public School	Mullingar, Sask., Can.

25. What university degree (if any) do you hold? None.

26. Are you at present employed in the United States on work relief projects or otherwise? Yes.

27. In the table below give the facts requested regarding any employment you have had in the United States during the past three years:

Name and Address of Employer	Nature of Work	Earnings Per Week (approximate)	Period of Employment From Month	From Year	To Month	To Year
Wm. Muhley, Newport, Wn...	Cafe Cook	$25.00	May	1941	Aug.	1941
Operated my own business from Aug. 1941 to present date		$25.00	Aug.	1941	July	1943

28. In the table below give the facts requested

Defendant's Exhibit No. 2—(Continued)

concerning the last three positions of employment you have held abroad:

Name and Address of Employer (Country)	Nature of Your Work	Earnings Per Week (approximate)	Period of Employment From— Month	Year	To— Month	Year
Clifford Farr Iirdrie, Alta Canada	Farm Hand	$15.00	June	1935	Oct.	1935
Ernest Wagner Innisfail, Alta Canada	Milk Wagon Operator	$25.00	Oct.	1935	May	1936
Fred Arnold Irrieana, Alta Canada	Farm Hand	$20.00	May	1936	July	1936

29. Is it necessary for you to accept employment to sustain yourself or those dependent upon you while you are in the United States? No. Why, or why not? Operate my own business. If your answer is "No," state approximately how long you will be able to sustain yourself or your dependents without accepting employment—Always.

20. For what types of employment are you qualified? Farming, Cafe Operating, Lumbering and general business of any kind.

32. Have you been engaged in business for yourself in the United States? Yes. If so, fill in the following table:

Name of Concern	Address	Nature of Business	Monthly Income You Derive	Period From— (Year)	To— (Year)
(Formerly)					
Antelers Cafe	Twisp, Wn.	Cafe	$100.00	1937	1938
Metaline Cafe	Metaline Falls, Wn.	Cafe	$100.00	1941	1942
Empire Cafe	110 Division St., Spokane Wn.	Cafe	$125.00	1942	1943

Defendant's Exhibit No. 2—(Continued)

33. Have you been engaged in business for yourself abroad? Yes. If so, fill in the following table:

Name of Concern	Address	Nature of Business	Monthly Income You Derive	Period From— (Year)	Period To— Year)
Farm	Vulcan, Alta, Can.	Wheat growing	$100.00	1928	1930
Kinema Lunch	Calgary, Alta.	Cafe	$100.00	1938	1939

34. What is your approximate total average from all sources? $125.00. What are the sources of your income? Operation of Empire Cafe at 110 N. Division St., Spokane, Wn.

35. Of what do your assets in the United States consist?

In Old National Bank, located at Old National Bank Bldg., Riverside, Spokane, cash in the sum of.....	$ 750.00
Value of interest in furniture and personal effects in your home.....	2000.00
Cash surrender value of insurance....	500.00
Total Assets	$3250.00

36. Of what do your assets abroad consist? None.

Total Assets $3250.00

Are these assets available for your support? Yes.

Why, or why not? Can withdraw cash from bank and turn other assets into cash.

37. Have you received assistance in the United States from any public relief agencies? No.

38. Have you received medical attention in the United States during the past 2 years? No.

Defendant's Exhibit No. 2—(Continued)

39. Have you ever been arrested for any reason whatever abroad? No.

40. Have you ever been arrested for any reason whatever while in the United States? Yes. If so, fill in the following table:

Date of Arrest	Place of Arrest	Nature of Offense	Disposition: Including Sentences Imposed and Facts Regarding Parole
Mar. 2, 1938	Twisp, Wn.	Illegal Entry	10 days in jail & deportation
July 22, 1943	Spokane, Wn.	Illegal Entry	Untried

41. Are you, or have you ever been:

(a) An anarchist? No.

(b) A person, who, or a member or affiliate of an organization or group which advocates, or teaches anarchism or opposition to all organized government, or the unlawful destruction of property? No.

(c) A person who advocates, teaches, writes, circulates, or possesses for the purpose of circulating, written matter advising, advocating or teaching opposition to all organized government, or the overthrow by force or violence of the Government of the United States (or of all forms of law, or the duty, necessity or propriety of the unlawful assaulting or assassination of public officials or of any officer or officers, specifically or generally, of the Government of the United States or of any other organized government, or the unlawful damage, injury or destruction of property, or sabotage? No.

Defendant's Exhibit No. 2—(Continued)

(d) A member or affiliate of any organization or group that writes, circulates, or possesses for the purpose of circulating, any written or printed matter advising, advocating or teaching any of the doctrines described in Questions 41 (b) or 41 (c)? No.

(e) A person who has given, loaned, or promised money or anything of value to any organization or group of the character described in Questions 41 (b) or 41 (d) or for use in the advocacy or teaching of any of the doctrines described in Questions 41 (b) and 41 (c)? No.

(f) A prostitute? No.

(g) An inmate of or person connected with the management of a house of prostitution? No.

(h) A person who receives, shares in, or derives benefit from any part of the earnings of any prostitute? No.

(i) A person employed by, in, or inconnection with any house of prostitution or music or dance hall, or any other place of amusement or resort habitually frequented by prostitutes, or where prostitutes gather? No.

(j) A person who assisted a prostitute, or who protected or promised to protect a prostitute from arrest? No.

(k) A person who imported or attempted to import to the United States any person

Defendant's Exhibit No. 2—(Continued)

for the purpose of prostitution or for any other immoral purpose? No.

(l) A person who has, knowingly and for gain, encouraged, induced, assisted, abetted, or aided any alien to enter or to try to enter the United States in violation of law? No.

(m) A person with any mental defect or disorder? No.

(n) A chronic alcoholic? No.

(o) A person suffering from tuberculosis? No.

(p) A person suffering from any loathsome or dangerous contagious disease? No.

(q) A polygamist? No.

42. (a) Have you registered under the Selective Training and Service Act of 1940? Yes. If so, give the number and address of your Local Board—Board No. 4, Armory Bldg., Spokane, Wn.
What is your Order No.? 10559.

(b) Have you previously served in the armed forces of the United States? No.

(c) Have you ever served in the armed forces of a foreign country? No.

43. Have you informed a consulate of any foreign country of your presence in the United States? No.

44. Have you in the past reported or collected information, or are you now reporting or collecting information, or do you intend to report or collect information for or to be submitted, directly or indirectly, to an

Defendant's Exhibit No. 2—(Continued)

embassy, legation, consulate, or other representative of a foreign government, a foreign political party, society, organization, or association? No.

45. Have any of your trips or activities in the United States been undertaken, directly or indirectly, at the suggestion or order of a foreign government, government official, organization, or society? No.

46. While in the United States have you ever acted, are you now acting, have you agreed to act, or do you intend to act, directly or indirectly, for pay or on a voluntary basis, as a public relations counsel, publicity agent, servant, representative, agent, attorney, or in any other capacity for or in the interest of a foreign government, a foreign government official, a foreign political party or of a corporation, association, organization, business, partnership, or society which is organized under the laws of a foreign country or subsidized directly or indirectly by a foreign government, foreign government official, or by a foreign corporation, association, organization, business, partnership, society, or political party? No.

47. Have any of your immediate relatives in the United States (including wives, husbands, parents, brothers, sisters, or children) acted, are they now acting, have

Defendant's Exhibit No. 2—(Continued)

they agreed to act, or do they intend to act, directly or indirectly, for pay or on a voluntary basis, as a public relations counsel, publicity agent, servant, or representative, agent, attorney, or in any other capacity for or in the interest of a foreign government, a foreign government official, a foreign political party or of a corporation, association, organization, business, partnership, or society which is organized under the laws of a foreign country or subsidized directly or indirectly by a foreign government, foreign government official, or by a foreign corporation, association, organization, business, partnership, society, or political party? No.

48. (a) At any time while you have been in the United States have you, in the political interest, on behalf of the public policy or in the furtherance of the public relations of a foreign government or foreign political party, distributed or disseminated information, statements, or propaganda by public speeches, radio addresses, printed material, or otherwise? No.

(b) Are you now engaged in any of the activities described in Question No. 48 (a)? No.

(c) Do you intend to engage in any of the activities described in Question No. 48 (a)? No.

Defendant's Exhibit No. 2—(Continued)

49. Have you ever supported, are you now supporting, or do you intend to support, by financial contribution or in any other way, any agency, organization, association, or corporation, which in the political interest, on behalf of the public policy or in furtherance of the public relations of a foreign government or a foreign political party, is directly or indirectly engaged in distributing or disseminating information, statements, or propaganda by public speeches, radio addresses, printed material, or otherwise? No.

50. (a) Have you ever held, or do you now hold a position in the employ or service of a foreign government? No.

(b) Was your last entrance into the United States in any way cause by or connected with any such governmental position? No.

51. Have any of your relatives (including wives, husbands, parents, brothers, sisters, or children) ever held, or do they now hold any position in the employ or service of a foreign government? No.

52. While you have been in the United States, of what organizations have you been a member and what have been the periods of your membership?

Name of Organization—Cooks & Waiters Union, Local 400 A.F.L.

Address—Empire Bldg., Spokane.

From—Feb., 1942, to July, 1943.

Defendant's Exhibit No. 2—(Continued)

53. Of the organizations you have listed in your answer to Question No. 52, are any of them directly or indirectly subsidized by, or do any of them have as one of their purposes the furthering of the interests, political activities, public relations, or public policy of a foreign government, foreign government official, or foreign organization? No.

54. Have you ever been, or are you at present a member of or affiliated with, any foreign political parties? No.

55. Would you be subject to racial, religious, social, or political persecutions if you were now in your native country or the country of your citizenship? No.

56. Have any of your relatives been imprisoned or persecuted for racial, religious, social, or political reasons by any foreign government, foreign government official, or foreign political party or organization? No.

57. (a) What person in the United States, apart from yourself, has the most personal knowledge of the facts you have stated in filling out this form? Elizabeth Meadows, Empire Hotel, Spokane, Wn.

(b) How long have you known this person? 3 years.

(c) What is this person's relationship to you? My secretary and assistant.

Defendant's Exhibit No. 2—(Continued)

58. Were you assisted in whole or in part in filling out this form? No.

Read Carefully. This Is a Part of Your Sworn Statement

I am aware that the act of June 8, 1938, as amended (52 Stat. 631; 53 Stat. 1244), provides among other things that every person who acts, engages in or agrees to act as a public relations counsel, publicity agent, or as agent, servant, representative, or attorney for the government or a political party of a foreign country, a person domiciled abroad, any foreign business, partnership, association, corporation, or political organization, or a domestic organization subsidized directly or indirectly in whole or in part by any of such entities or who receives compensation from or is under the direction of any of the foregoing shall, with certain exceptions, file with the Secretary of State a registration statement as prescribed therein.

I am aware that this act exempts among others a duly accredited diplomatic or consular officer of a foreign government only if so recognized as such by the Department of State of the United States, and any official other than an American citizen, of a foreign government recognized by the United States as a government, or member of the staff or person employed by a duly accredited diplomatic or consular officer of a foreign government who is so recognized by the Department of State, other than a public relations counsel or publicity agent, only if the status and the character of the duties as such official, member of staff, or employee are of

Defendant's Exhibit No. 2—(Continued)

record in the Department of State.

I am further aware that any person who wilfully fails to file any statement required to be filed under this act, or in compliance with the provisions of this act, makes a false statement of material fact, or willfully omits to state any material fact required to be stated therein shall, upon conviction thereof, be punished by a fine of not more than one thousand dollars or imprisonment for not more than 2 years, or both.

I am submitting this General Information Form in connection with an application for (check one or more):

[x] Permission to depart from the United States at my own expense in lieu of deportation;

[x] The privilege of pre-examination.

I am aware that any statements I have made in answer to the questions in this form may be used as evidence in any proceeding to determine my right to enter, reenter, pass through, or reside in the United States, and that false answers to any of the questions asked me herein may bar me from the relief which I have requested in my application.

I have read my answers to the questions on this General Information Form and swear (affirm) that they are true of my own knowledge, except as to my answers to Question 5 (a) (b), 8 (b) (c) (e), 9 (b) (c) (e), 41 (m) (o) (p), 47, 51, 53, 55, 56,

Defendant's Exhibit No. 2—(Continued)

and 57 (a), which I swear (affirm) are true to the best of my information and belief.

WM. WADE RICKETTS,
Signature of Applicant.

Subscribed and sworn to (affirmed) before me, this 2nd day of August, 1943.

JAMES E. SULLIVAN,
Immigrant Inspector.

Question 10 Continued

Twisp, Wn.	U.S.A.	Sept.	1936	to	June	1938
Calgary, Alta	Can.	Nov.	1938	to	Dec.	1939
Spokane, Wn.	U.S.A.	Dec.	1939	to	July	1943

DEFENDANT'S EXHIBIT No. 14

Form 607

U. S. Department of Labor

Immigration Service

File No. 9012/7999. Report of Hearing in the Case of William Wade Ricketts.

Under Department warrant No. Telegraphic. Dated March 1, 1938. Hearing conducted by S. H. Stewart, Immigrant Inspector, at Spokane, Washington. Date, March 3, 1938.

Alien taken into custody at (Place) Twisp, Washington, on (Date and hour) March 1, 1938, at 7:00 p.m., by Frank S. Nooney, Immigrant Inspector, and (state if released on own recognizance or bail, or if detained, where) temporarily detained Chelan County Jail, Wenatchee, Wash. On March 2, 1938, conveyed to Spokane, Wash., and detained in Spokane County Jail.

Testimony taken and transcribed by Peter Szambelan, Clerk.

Defendant's Exhibit No. 14—(Continued)

Said William Wade Ricketts, being able to speak and understand the English language satisfactorily, no interpreter was employed (if other than regular Government employee, state as to being first duly sworn).

Said William Wade Ricketts was informed that the purpose of said hearing was to afford him an opportunity to show cause why he should not be deported to the country whence he came, said warrant of arrest being read and each and every allegation therein contained carefully explained to him. Said alien was offered an opportunity to inspect the warrant of arrest and the evidence upon which it was issued, which privilege was accepted. The alien being first duly sworn (if not sworn, state reason) the following evidence was presented:

Q. What is your correct name?

A. William Wade Ricketts.

Q. Have you ever been known by another name?

A. No.

Q. You are advised that under these proceedings you have the right to be represented by counsel of your own selection which may be an attorney at law or any person of good character and reputation. Do you desire to be represented by counsel?

A. No.

Q. Are you will then to waive your right to be represented by counsel and are you willing to proceed with this hearing without counsel?

A. Yes.

Q. Please state the date and place of your birth?

A. February 2, 1902, at Hydro, Oklahoma. [247]

Defendant's Exhibit No. 14—(Continued)

Q. What was your father's name and birthplace?

A. His name was Seigle Ricketts and I think he was born in Red Oak, Iowa. I am not sure about that.

Q. What was your mother's maiden name and birthplace?

A. Emma Sheppard. She was born at Bartonville, Illinois.

Q. Where are your parents now?

A. My mother is dead and my father is living at Mullingar, Saskatchewan.

Q. When and where did your mother die?

A. At Mullingar, Saskatchewan, 29th of January last year.

Q. Have you any brothers or sisters?

A. Yes, seven brothers, no sisters.

Q. What are their names, approximate dates of birth, places of birth and present addresses?

A. Clyde Elmer Ricketts.

Q. How old is he now?

A. Approximately 45.

Q. He was born where?

A. Peoria, Illinois.

Q. Where is he now?

A. At Metting Lake, Saskatchewan.

Q. Next?

A. Wayne Charles Rickets, the second one, 42, now at Newport, Washington, born at Peoria, Illinois.

Q. Next?

A. Floyd Ricketts, 39 I guess, lives at Battleford, Saskatchewan, born Hydro, Oklahoma.

Defendant's Exhibit No. 14—(Continued)

Q. Next?

A. Noel Ricketts. I can't give you the addresses of these first two boys I named. Noel is 34. He is at Mullinger, Saskatchewan.

Q. Where was he born?

A. Hydro, Oklahoma.

Q. Next? A. Glenn Ricketts.

Q. Born where?

A. Hydro, Oklahoma; approximately 30 I imagine, now at Calgary, Alberta.

Q. What is the street address?

A. I can't give you his street address.

Q. Next? A. Raymond Ricketts.

Q. Age and place of birth?

A. He would be about 26 or 27; born in Hydro, Oklahoma.

Q. Present address?

A. Mullingar, Saskatchewan.

Q. Next?

A. Claude Ricketts, born at Mullingar, Saskatchewan, he is 25, his present address is Mullingar, Saskatchewan.

Q. Of what country are you now a citizen?

A. Canada.

Q. Of what race are you?

A. Scotch-Irish.

Q. How did you become a citizen of Canada?

A. Through my father's naturalization while I was a minor. [248]

Q. Where and when was your father naturalized?

A. At Battleford, Saskatchewan, about the year 1914 or 1915. I can't give the exact date.

Defendant's Exhibit No. 14—(Continued)

Q. Are you sure that is the year?

A. What I am basing it on is this, he homesteaded in 1910 in Saskatchewan and they must take out their title patent inside of five years.

Q. It was three years?

A. But you could get an extension of two years. I am rather sure my father did.

Q. When did you emigrate to Canada from the United States? A. In July, 1910.

Q. Where did you enter Canada?

A. At Emerson, Manitoba.

Q. Who was with you at that time?

A. Father and mother and my brothers.

Q. All of your brothers who were born in the United States? A. Yes, the whole family.

Q. Did you move horses and machinery?

A. Yes. My father took a stock car up and we went by passenger train, my mother and brothers.

Q. Did you ever become naturalized in Canada in your own right? A. No, never.

Q. Did you ever take an oath of allegiance to the British government or Canadian government?

A. No.

Q. Since becoming naturalized in Canada have you ever in any manner forfeited that citizenship?

A. No.

Q. Have you lived in Canada all of the time since you emigrated to that country in 1910?

A. No, I have been down in the States for a few months at a time, temporarily.

Q. But your permanent home has been in Canada all of the time since 1910? A. Yes.

Defendant's Exhibit No. 14—(Continued)

Q. Do you own any property in Canada?

A. No.

Q. Have you ever held any property there, any land or real estate? A. No.

Q. What property have you held?

A. Stock and machinery.

Q. Where?

A. At Mullingar, Saskatchewan and at Vulcan, Alberta.

Q. Did you rent land? A. Yes.

Q. When did you leave Mullingar, Saskatchewan?

A. I left Mullingor at about the 3rd of October, 1930, the last time I left there.

Q. Where did you go then?

A. To Ensign, Alberta.

Q. What did you do there?

A. I worked as a farm laborer.

Q. How long did you live there?

A. I lived there four years.

Q. Who did you work for?

A. Martin Jensen and Al Hage. [249]

Q. And who else?

A. I worked for a number of people for odd times. Those two would be the main ones.

Q. That would be up until about 1934?

A. Yes.

Q. Then where did you go?

A. To Airdrie, Alberta.

Q. What did you do there?

A. I worked on a threshing machine and as a harvest hand for Tom Farr and Clifford Farr.

Defendant's Exhibit No. 14—(Continued)

Q. How long were you there?

A. I was there three or four months.

Q. And then where did you go?

A. To Dalemead, Alberta.

Q. What did you do there?

A. I looked after a herd of beef cattle for the McKinnon Brothers.

Q. How long were you there?

A. About four or five months.

Q. What made you smile when you spoke of that?

A. I was just keeping track of the various places I was working.

Q. Where did you go from there?

A. Black Diamond, Alberta.

Q. What did you do there?

A. Drove a milk wagon for Ernest Wegener.

Q. How long were you there?

A. Approximately four months.

Q. Then where did you go?

A. Back to Airdrie and worked for Clifford Farr.

Q. How long did you work there?

A. The balance of the fall, three or four months. Then I went to Innisfail.

Q. Who did you work for there?

A. I worked for, I can't think of his name now.

Q. How long were you there?

A. Six months I believe, exactly six months. I was driving a milk wagon there too.

Q. Then where did you go?

Defendant's Exhibit No. 14—(Continued)

A. I went to Irricana, Alberta. I worked there approximately 2½ months.

Q. For who?

A. For Mrs. Fred Arnold, as farm laborer.

Q. Then where did you go?

A. To Kamloops, B. C.

Q. How long did you stay there?

A. Seven weeks.

Q. Where did you go from there?

A. To Twisp, Washington.

Q. When was that?

A. I crossed the line at Oroville I believe it was the 6th of September 1936.

Q. Were you inspected at that time by a U. S. immigrant inspector? A. Yes.

Q. How were you admitted?

A. I was admitted for a two weeks visit as a visitor.

A. Did you return to Canada within the two weeks?

A. No, I didn't. I stayed until I believe it was in December, about the 8th of December I believe I went back to the line. I had some correspondence—— [250]

Q. Did you apply for an extension of your temporary stay?

A. No, I did not exactly. I wrote to Brunner up at Oroville, the inspector at Oroville and I told him I would come to see him personally on the 8th of December, I believe.

Q. Then when did you go back to Canada?

A. I went back to Oroville approximately the

Defendant's Exhibit No. 14—(Continued)

8th of December 1936 and applied for a six months extension and was granted a six months extension.

Q. And that was good then until June 1937?

A. Yes.

Q. Then did you go back to Canada in June 1937? A. Yes.

Q. Then when did you next enter the United States?

A. I entered the States on the 14th of—I went back about the first of June but my time was up on the 8th. I came back across the line at Cascade on the 14th of June, I believe it was, 1937.

Q. You mean at Laurier, Washington?

A. Yes.

Q. You were admitted for a three months temporary visit? A. Yes.

Q. Why did you not enter the United States through Oroville?

A. I was visiting friends at Rossland and naturally that was the closest port and I was coming down to Newport to see my brother as well.

Q. Did you go back within the three months?

A. No. Then I applied for a temporary extension.

Q. What happened then?

A. I applied, I wrote to Laurier to the official there and he referred my letter to Mr. Wyckoff. I came in to see him personally and he told me to go to Vancouver.

Q. He told you it would be necessary to leave the United States? A. Yes.

Defendant's Exhibit No. 14—(Continued)

Q. You were in business at Twisp?

A. Yes, from the first of August.

Q. Had you been in business at Twisp before that time?

A. No, I was just visiting there.

Q. You were visiting there at Twisp for several months? A. Yes.

Q. Who were you visiting?

A. Richard Horn.

Q. You mean he boarded you all that time for nothing? A. Not for nothing.

Q. Did you pay him board? A. Yes.

Q. Weren't you working in the restaurant at Twisp?

A. I was in the restaurant and helped out. I just went and helped them out temporarily but I wasn't employed in the restaurant.

Q. When did you acquire an interest in that restaurant there?

A. The first of August 1937.

Q. Who were you in partnership with?

A. Mrs. Agnes Miller. [251]

Q. Did you buy an interest in it? A. Yes.

Q. How much did you invest in it?

A. $50.00. Previously the restaurant and everything had belonged to Richard Horn who is a brother of Mrs. Miller and then he sold out to another party. We had been working there for her brother and she and I leased the restaurant and have been running it in partnership since.

Q. Did you return to Canada at Mr. Wycokoff's suggestion? A. Yes.

Defendant's Exhibit No. 14—(Continued)

Q. When did you leave the United States?

A. I left at Blaine, Washington, I think it was the 25th of October 1937.

Q. Were you going to Vancouver?

A. Yes, I was going to Vancouver to apply for a proper visa to enter this country.

Q. For permanent residence? A. Yes.

Q. Did you apply for a visa?

A. Yes, I did but I did not have the necessary papers for them to grant me one so I talked it over with the American Consul and he told me to go to the Immigration official and I thought I had to come back to my business and he told me to go to the Immigration officials and ask for permission to come back temporarily until I could get these papers which he required.

Q. And what happened?

A. I was refused admittance. I have a copy of their board decision if you wish to see it.

Q. Was that upon the ground that you were not in possession of an unexpired immigration visa?

A. Yes, that is the sole reason for exclusion.

Q. At the time of that exclusion were you warned, informed that you could not enter the United States within a year unless you got special permission from the Secretary of Labor?

A. Yes.

Q. Were you warned as to the penalty for entering the United States without permission from the Secretary of Labor?

A. No, I wasn't warned as to the penalty.

Defendant's Exhibit No. 14—(Continued)

Q. But you were warned that it was illegal to enter the United States unlawfully? A. Yes.

Q. What happened after that?

A. I had to get back to my business and I drove from Vancouver to Kamloops and from Kamloops to Osoyoos, B. C. I left my car there and waited until the middle of the night and walked across the line.

Q. Osoyoos is the Canadian port immediately opposite Oroville, is it not. A. Yes. [252]

Q. Just where did you enter the United States?

A. I should judge within a mile west of the immigration office. I just walked over the hill.

Q. Why did you enter in that manner?

A. Because I didn't believe they would enter me if I applied properly.

Q. Were you inspected by a U. S. Immigrant inspector at the time of that entry? A. No.

Q. Did you deliberately elude examination and inspection by U. S. immigration officers?

A. Yes, I imagine you would call it that.

Q. Where did you go to? A. To Twisp.

Q. At the time of that entry were you in possession of an unexpired immigration visa?

A. No.

Q. How much money had you?

A. I had approximately $50 to $75.

Q. How did you get your car into the United States? A. I sent a friend up to get it.

Q. Who was the friend?

A. Mrs. Agnes Miller.

Defendant's Exhibit No. 14—(Continued)

Q. Did she go up and get the car?

A. Yes.

Q. Did she know that you entered the United States illegally?

A. I hadn't entered the States yet. I made a misstatement and I should correct it. I brought my car to Osoyoos and I went back to Vernon and stayed there about a week. I left my car at Osoyoos. I notified her by mail to come and get the car. Then I came down alone.

Q. Did you tell her in the letter why you wanted her to come up and get the car?

A. No. I told her I was returning to Canada.

Q. On what date did you enter the United States?

A. It was approximately the 3rd or 4th of November 1937. I think it was a day after she got the car.

Q. Was it your car or her car?

A. It is a partnership car. It is in my name but is a partnership car.

Q. After coming to Twisp did you tell her that you had entered unlawfully? A. No.

Q. Did you tell her later on that you had?

A. Yes.

Q. How long ago? A. About ten days ago.

Q. You told her that you entered unlawfully?

A. Yes.

Q. Did you tell other people in Twisp that you had entered unlawfully?

A. No, I don't think I did.

Defendant's Exhibit No. 14—(Continued)

Q. Didn't you tell Inspector Nooney that everyone in Twisp knew how you entered [253] the United States? A. No.

Q. Were you living in Twisp with Mrs. Agnes Miller? A. Not living with her.

Q. In the same house? A. Yes.

Q. Anyone else living there? A. No.

Q. How old is she?

A. About 50 years old.

Q. Considerably older than you? A. Yes.

Q. Have you been quite friendly with a girl named Ruth Danielson?

A. Yes, she is a friend of mine.

Q. Did you intend to go to Vancouver with her.

A. No.

Q. Did you or did you not send her a telegram asking her to meet you in Wenatchee and go with you to Vancouver?

A. I did tell her to meet me in Wenatchee but I didn't say anything about going to Vancouver?

Q. Did Mrs. Miller know Miss Danielson?

A. Yes.

Q. Was Ruth Danielson up at Twisp?

A. No. She knows of her; she doesn't know her personally.

Q. You knew that Mrs. Miller was in Spokane recently, didn't you?

A. Mrs. Agnes Miller—no, I didn't, must be since I came in because it is news to me.

Q. Have you ever been refused admission to the United States at any time other than on October 26, 1937? A. No.

Defendant's Exhibit No. 14—(Continued)

Q. Have you ever been deported from the United States? A. No.

Q. Have you ever been arrested under any charge whatsoever? A. Never.

Q. I am now placing two additional charges against you. One is that you entered the United States by land at a place other than a designated port of entry for aliens and the other is that you were not in possession of an unexpired immigration visa at that time. Under these two additional charges you also have the right to be represented by counsel. Do you desire to be represented by counsel under these two additional charges?

A. No.

Q. Do you then waive your right to be represented by counsel and are you wiling to proceed with this hearing without counsel? A. Yes.

Q. You have been shown the warrant of arrest and had the charge carefully explained to you. I am now showing you the evidence upon which this warrant was based. This evidence consists of a letter addressed to the District Director at Spokane on March 1, 1938, by Immigrant Inspector Frank S. Nooney marked Exhibit A; a rejection notice covering your rejection [254] at Vancouver, B. C. on October 26, 1937, marked Exhibit B; and a copy of a telegram from our Vancouver, B. C. office marked Exhibit C. (Evidence handed to and read by alien). I am showing you a transcript of a record of hearing before a board of special inquiry held at Vancouver, B. C. on October 26, 1937 in the case

Defendant's Exhibit No. 14—(Continued)

of William Wade Ricketts and will ask you to read it and state whether that is a record of your hearing before the board of special inquiry at Vancouver?

A. There are two mistakes here in my father's name and address. His first name is Seigle and the name of the town where he lives is Mullingar instead of Bellingar. It says my father was naturalized in 1910; he was not, he went to Canada in 1910 but he wasn't naturalized in 1910. I stated a while ago I didn't understand about penalties but they did mention fine and imprisonment but they didn't specify. Yes, it is all correct except for the items I mentioned.

Q. I am now introducing this document in evidence and marking same Exhibit D. A copy of the evidence upon which the warrant was based was forwarded to the Secretary of Labor at Washington, D. C. with the application for the warrant of arrest and will be given consideration together with the evidence adduced at this hearing in arriving at a decision in your case. What schools did you attend in Canada?

A. Just the public school, grade school, the Misterton School District near Mullingar, Saskatchewan.

Q. What churches did you attend in Canada?

A. None. I have been to various churches but I wasn't a member of any church.

Q. Were you ever baptized? A. Not to my knowledge.

Defendant's Exhibit No. 14—(Continued)

Q. What was the nearest large city to the place of your birth? A. Oklahoma City.

Q. How far and in what direction is that from Hydro?

A. About 130 miles east and possibly a little more.

Q. Have you any business affairs to settle before leaving the United States if you are ordered deported? A. Yes.

Q. What?

A. I have some bills to collect, outstanding accounts and a stock of groceries to dispose of and my partnership to wind up.

Q. Couldn't your partner handle that?

A. She could but she is a lady.

Q. The warrant of arrest provides that you may be released from custody under bond in the amount of $500. Are you able and willing to post a bond in that amount for your release?

A. Yes. I requested the jailor to get in touch with a bonding company. [255]

Q. I wish to warn you at this time that under the Act of March 4, 1929, as amended, you will, if ordered deported, and thereafter enter or attempt to enter the United States, be guilty of a felony and upon conviction be liable to imprisonment of not more than two years, or a fine of not more than $1000, or both such fine and imprisonment, unless you, following your departure from the United States in pursuance of an order of deportation, receive permission from the Secretary of Labor to

Defendant's Exhibit No. 14—(Continued)

apply for admission after one year from the date of such departure. Do you understand that warning? A. Yes.

Q. Have you any further statement you wish to make to show cause why you should not be deported?

A. Well, I haven't done anything criminal and have a previous record reasonably good. I wish to become an American citizen and I really believe that this, the fact of my illegal entry, could be overlooked if I applied for permanent citizenship here.

Q. Your record indicates that you first entered the United States on the 6th of September 1936 and you were admitted for two weeks but you didn't go out within the two weeks and you didn't get any application for an extension until December?

A. There is a mistake here. I did send a slip that this inspector gave me and I sent it to Oroville, Washington. He says that he did not get it but I sent it by mail not registered mail and he says he didn't get it and I didn't know anything about it and one day the banker in Twisp had occasion to cross the line at Oroville and Brunner asked him if he knew me and he said yes and Brunner immediately wrote to Dick Horn who I came to visit. Dick gave me the letter and I wrote back to Brunner and told him I would come back to the line immediately which I did do.

Q. Then you entered on June 14, 1937, for a

Defendant's Exhibit No. 14—(Continued)

temporary period of three months again to visit Richard Horn and at that time you went into business and therefore lost your status as a visitor. That was explained to you by Mr. Wyckoff, wasn't it, that you were illegally in the United States.

A. Yes.

Q. Mr. Wyckoff at that tiem permitted you to depart voluntarily in lieu of deportation proceedings and informed you that you could not work in the United States or engage in business while you were in a temporary status, did he not?

A. Yes.

Q. If you wanted to do that, that you should go to an American Consul and get an immigration visa and be admitted for permanent residence?

A. Yes, that [256] is true.

Q. Then you left the United States on October 25, 1937, and went to Vancouver and applied for an immigration visa, is that right? A. Yes.

Q. But you didn't have the required papers and that you then went and applied for admission at the immigration office and were rejected and warned as to the penalty of entering the United States unlawfully but in spite of that you entered the United States very shortly thereafter, deliberately and knowingly illegally? A. Yes.

Q. If and when you are ordered deported, to what place in Canada do you wish to be sent?

A. To Kamloops, B. C.

Personal Description: Height 5'8"; weight 148

Defendant's Exhibit No. 14—(Continued)

lbs.; brown eyes; brown hair; ¾″ scar across right wrist; end of right index finger injured.

A true and correct transcript.

/s/ PETER SZAMBELAN,
Clerk.

Notebooks Nos. 7 and 8 transcribed 3/3/38.

FINDINGS

The alien was not represented by counsel. Two additional charges were placed against him, to wit: That he entered by land at a place other than a designated port of entry for aliens; that at the time of his entry he was not in possession of an unexpired immigration visa.

This record discloses that William Wade Ricketts, the subject of these proceedings, is an alien, a native of the United States and citizen of Canada through the naturalization of his father in that country during his minority; that since becoming a British subject he has never been admitted to the United States for permanent residence; that he entered the United States at Laurier, Washington on June 14, 1937, claiming to be coming at that time for a temporary visit destined to his friend, Richard Horn, at Twisp, Washington, with whom he claims to have visited for more than eight months immediately prior to that time; that Horn was the proprietor of a restaurant in which the alien claims to have subsequently acquired a $50.00 interest; that after his admission on June 14, 1937, he became actively employed in this restaurant; that he was discovered by officers of this Service to have vio-

Defendant's Exhibit No. 14—(Continued)

lated his visitor's status and was permitted to depart voluntarily in lieu of deportation [257] proceedings; that he departed through Blaine, Washington on October 25, 1937, and on the following date applied for admission to the United States at Vancouver, B. C.; that he was excluded as an immigrant alien not in possession of an unexpired immigration visa and informed that he could not enter the United States within a year from that date and without securing permission from the Department and as to the penalty of entering illegally; that in spite of this warning, he proceeded immediately in his automobile to the Canadian port opposite Oroville, Washington where he left his car; that he then walked a distance of about one mile west of the port of Osoyoos and then crossed the international boundary line without inspection; that he then returned to Twisp, Washington and resumed his employment and business at the Antlers Restaurant where he was apprehended on the 1st instant.

CONCLUSIONS

In the opinion of the examining inspector the charge contained in the warrant of arrest and the two additional charges placed against the alien at the time of the hearing are fully sustained by the evidence and the alien is therefore subject to deportation to Canada, the country whence he came and of which he is a citizen.

S. H. STEWART,

shs ps Immigrant Inspector. [258]

DEFENDANT'S EXHIBIT No. 15

9012/7999

Sworn Statement of William Wade Ricketts made before Immigrant Inspector Guy H. Walter at Spokane, Washington, on April 1, 1942.

By Inspector Walter:

Mr. Ricketts, you are advised that I am a United States Immigration Inspector and authorized by law to administer oaths in connection with the enforcement of the Immigration and Naturalization laws of the United States. I desire to obtain a statement from you at this time concerning your status under the immigration laws and the Alien Registration Act of 1940. Any statement which you make should be given voluntarily, and you are hereby warned that such a statement may be used against you in any criminal or deportation proceeding. Are you willing to answer my questions under those conditions? A. Yes.

Q. Are you willing to take an oath to tell the truth? A. Yes.

Alien duly sworn.

Q. What is your full, true and correct name?

A. William Wade Ricketts.

Q. Have you ever used or been known by any other name or names? A. Yes.

Q. What other names?

A. Ward Richards and Walter Richards.

Q. When did you use the name of Ward Richards?

A. I used that name in the winter of 1939.

Defendant's Exhibit No. 15—(Continued)

Q. Where did you use it?

A. At Colville, Washington.

Q. For what reason did you use that name?

A. To obtain employment in Washington state.

Q. Why didn't you use your own name in that respect.

A. That is a very technical question. I don't want to commit myself. The reason was that I had entered the country in the eyes of the immigration officers illegally, and I couldn't obtain employment without my presence becoming known. [259]

Q. When did you use the name Walter Richards?

A. I used that name in May and June of 1941, also for the purpose of obtaining a social security card and obtaining employment.

Q. Why did you use the name of Walter Richards in place of your name at that time?

A. For the same reason.

Q. You mean for the reason that you didn't want——

A. I didn't want my correct name to become known.

Q. At the time that you used these assumed names, then you did so because you didn't want the United States Immigration officers to know that you were in the country. Was that the reason?

A. That is correct.

Q. Exactly where and when were you born?

A. I was born in the little town of Hydro, Oklahoma, February 3, 1902.

Q. Of what country are you now a citizen?

Defendant's Exhibit No. 15—(Continued)

A. Well I'd rather not answer that. I think I'm an American and the immigration officers say I'm Canadian. My sole grounds in this case is that I've never taken out my papers in Canada, and I maintain I'm an American and the immigration officials maintain I'm a Canadian.

Q. What was your father's name?

A. Seigle Ricketts.

Q. Where was he born?

A. I don't rightly know. He was born in the State of Indiana I believe.

Q. Is he now living? A. No.

Q. What was your mother's name?

A. Emma Shepard.

Q. Where was she born?

A. In Barnville, Illinois.

Q. Is she alive at the present time?

A. No, she isn't.

Q. Where was your father buried?

A. At Mayfair in the province of Saskatchewan, Canada.

Q. What year did he die? A. 1938. [260]

Q. Where was your mother buried?

A. At the same place. Mayfair.

Q. What year did she die? A. In 1939.

Q. Do you have brothers and sisters?

A. Yes.

Q. What are their names and present places of residence?

A. Clyde Ricketts, Meeting Lake, Saskatchewan; Wayne Ricketts, Winlock, Washington; Boyd

Defendant's Exhibit No. 15—(Continued)

Ricketts, I don't know his address, somewhere in Canada; Noel Ricketts, also somewhere in Canada; Glenn Ricketts, residence Calgary, Alberta, Canada.

Q. Do you know Glenn Ricketts' street address?

A. No, I do not. And Raymond Ricketts, residence somewhere in Canada, Claude Ricketts, also Canada residence unknown.

Q. Are you married or single?

A. I'm married.

Q. What is your wife's name?

A. Edith B. Ricketts.

Q. Where does she reside?

A. She resides at 12½ South Howard Street, Herald Hotel.

Q. What was her maiden name?

A. I'm sorry I can't tell you. I do know it, but I don't recall it.

Q. When were you married?

A. October 31, 1940.

Q. At what place?

A. Coeur d'Alene, Idaho.

Q. Are you and she living together now?

A. No.

Q. How long since you have lived with your wife?

A. I haven't lived with her since May of 1941.

Q. Do you have any children? A. No.

Q. Of what race are you?

A. Scotch, Irish.

Q. What was your father, Scotch or Irish?

Defendant's Exhibit No. 15—(Continued)

A. Scotch and Irish. My mother was English and Dutch.

Q. What racial strain was predominant in your father's family? A. Scotch. [261]

Q. What is your occupation?

A. I'm a cook—cafe cook.

Q. Where do you now reside?

A. 108 North Division, Empire Hotel.

Q. Are you employed at the present time?

A. Yes, I have my own business.

Q. What is the name and location of your business?

A. Empire Cafe, 110 North Division, Spokane.

Q. How long have you been in business at that place? A. A little over two months.

Q. Have you previously resided in Canada?

A. Yes.

Q. When did you first go to Canada?

A. In July of 1910.

Q. How old were you at that time?

A. Approximately eight years old.

Q. Who did you then go to Canada with?

A. With my father and mother.

Q. Were each of your brothers born in Canada?

A. No, all of us were born in the United States except my younger brother. He was born in Canada.

Q. What is his name?

A. Claude Ricketts.

Q. Are you the oldest boy in the family?

A. No, there are three older than me.

Q. After you entry to Canada in July, 1910, did

Defendant's Exhibit No. 15—(Continued)

your father become naturalized as a citizen of Canada? A. Yes.

Q. When and where did your dad naturalize as a citizen of Canada?

A. I believe it was in the year of 1915 at North Battleford, Saskatchewan. That is just a guess as to the year, but it was about that time.

Q. And were you then a minor child residing in Canada with your parents? A. Yes.

Q. At the time of your father's naturalization in Canada then, you automatically became a British subject?

A. I was given full rights as a British subject yes. [262]

Q. Did your father prove up on a homestead?

A. Yes.

Q. Before he could prove up on his Canadian homestead, was it necessary for him to become a naturalized citizen of Canada? A. Yes.

Q. How long did you remain in Canada after your entry to that country in July, 1910?

A. From July, 1910, until June of 1926.

Q. Where did you then go?

A. I came to Spokane.

Q. Where did you enter the United States on that occasion?

A. At Kingsgate, Eastport I guess is the other side.

Q. From the date you became 21 years of age until 1926, did you exercise any rights as a Cana-

Defendant's Exhibit No. 15—(Continued)

dian citizen in Canada such as voting or holding any public office? A. No, I did not.

Q. Did you vote at any time in Canada?

A. I voted once in Canada. I think it was the year of 1928.

Q. When you entered the United States in 1926 what time of the year was it?

A. It was in June.

Q. How were you traveling?

A. I came from Calgary, Alberta, on the C. P. R. and Spokane International Railway into Spokane.

Q. For what purpose were you then coming to the United States?

A. To obtain employment.

Q. How long did you then intend to remain in the States?

A. That is a very indefinite question. I only remained a couple of months. Then I returned to Canada. I was here in the winter of 1926.

Q. Did you have any intention at that time of remaining permanently in the United States?

A. Yes, I did.

Q. Were you examined by United States Immigration officers at Eastport when you entered in 1926? A. Yes.

Q. How were you then admitted to the United States? Were you then admitted as an alien?

A. No, I was admitted as an American. In fact I had an argument with [263] Inspector Kelley. He maintained that I was even though I had the

Defendant's Exhibit No. 15—(Continued)

rights of a British subject. I asked him and he said I was American.

Q. Well then did you maintain at that time that you were a Canadian citizen?

A. To all beliefs yes.

Q. Did you then surrender an unexpired consular immigration visa and pay head tax at Eastport?

A. No, at that time it wasn't necessary to have a visa, and they didn't ask me for the head tax. I offered to pay it and they wouldn't accept it.

Q. How long did you remain in the States on that occasion? A. About six weeks.

Q. Then were did you go?

A. I returned to Calgary, Alberta.

Q. Through what port did you enter Canada?

A. Kingsgate.

Q. Where you then admitted to Canada as a British subject? A. Yes.

Q. When was the next time that you came into the United States?

A. I came down again in December of 1926. I think it was December. It might have been November, during the winter months.

Q. How were you then traveling?

A. I came by C. P. R. and S. I. Railway.

Q. Where did you then cross the border?

A. At Eastport.

Q. Were you examined by immigration officials at that time? A. Yes.

Defendant's Exhibit No. 15—(Continued)

Q. How were you then admitted into the United States?

A. To permanently make my home here.

Q. Where did you go in the States then?

A. Spokane.

A. I worked that winter for the Hedlin Lumber Company at Marcus, Washington.

Q. How long did you remain in the States on that occasion?

A. About five or six months.

Q. Then where did you go?

A. I returned to Ensign.

Q. Where did you enter Canada on that occasion? A. At Kingsgate.

Q. Were you then admitted to Canada as a British subject? [264] A. Yes.

Q. When was the next time that you entered the States?

A. I entered the States in September of 1936.

Q. Where did you enter at that time?

A. Oroville, Washington.

Q. How were you then traveling?

A. I came by bus.

Q. Were you examined by immigration officers at Oroville? A. Yes.

Q. How were you then admitted to the United States?

A. I was admitted as a tourist on a visit here.

Q. You mean by that that you were admitted as an alien for a temporary visit?

A. Yes, I guess that is what you would call it.

Defendant's Exhibit No. 15—(Continued)

Q. For what purpose were you then coming into the United States? A. To visit friends.

Q. Where were you destined?

A. Twisp, Washington.

Q. Did you surrender an unexpired consular immigration visa and pay head tax at Oroville, Washington, at that time? A. No.

Q. How long were you then admitted into the United States for?

A. I was originally admitted I believe for thirty days, possibly two weeks.

Q. How long did you remain in the States at that time?

A. I remained in the States at that time on renewed permits until June of 1937.

Q. Did you again return to Canada?

A. Yes.

Q. Where did you enter Canada on that occasion? A. Osoyoos.

Q. Were you examined by Canadian immigration officers at Osoyoos? A. Yes.

Q. And were you then admitted to Canada as a British subject? A. Yes.

Q. When was the next time that you entered the United States?

A. I entered the United States two weeks later. It was still in the month of June I believe at Cascade. Laurier. [265]

Q. How were you traveling at that time?

A. By private car.

Q. Vas it your car? A. No.

Defendant's Exhibit No. 15—(Continued)

Q. Who accompanied you?

A. Mrs. Agnes Miller.

Q. Where was she from?

A. Twisp, Washington.

Q. Were you examined by United States Immigration officers at Laurier, Washington, on that occasion? A. Yes.

Q. What disposition was made of your application for admission to the United States then?

A. They granted me sixty days I believe.

Q. You mean that you were then admitted to the United States as an alien for a temporary visit for a period of sixty days? A. Yes.

Q. At that time did you surrender an unexpired immigration visa and pay head tax and apply for admission to the United States for permanent residence? A. No.

Q. For what purpose were you then coming into the United States?

A. To engage in business.

Q. Did you tell the United States Immigration officer at Laurier that you were destined to Twisp, Washington, to engage in business? A. No.

Q. Why did you not inform him at that time of the purpose for which you were coming to the United States?

A. It was just an oversight at that time. I was merely coming to look the business over. I didn't know definitely if I would buy the business.

Q. How long did you remain in the States on that occasion?

Defendant's Exhibit No. 15—(Continued)

A. Until approximately the first of October, 1937.

Q. From the time you were admitted to the States at Laurier, Washington, June, 1937, until your departure from the United States in October, 1937, had you written this office stating your desire to remain permanently in the United States? [266]

A. Yes.

Q. Had this office informed you that it would be necessary for you to depart from the United States and obtain an immigration visa and be admitted to this country as an alien for permanent residence?

A. Yes.

Q. In connection with your entry as a temporary visitor at Laurier, Washington, in 1937, I now show you Form 505, Certificate of Admission of Alien, dated at Laurier, Washington, on September 22, 1937, bearing Laurier file No. 216/50, relating to one William Ricketts, who was admitted at Laurier, Washington, on June 14, 1937, age 35 years, born at Hydro, Oklahoma, citizen of Canada, Scotch race, destined to friend, Richard Horn, Twisp, Washington, for a visit of three months. (Form handed to alien). Does this record refer to your admission at Laurier, Washintgon, for a temporary visit of three months on June 14, 1937?

A. That is correct.

Q. Our file also contains a letter, reading as follows: Twisp, Washington, September 27, 1937, addressed to the United States Department of Labor, Immigration and Naturalization Service,

Defendant's Exhibit No. 15—(Continued)

Spokane, Washington. "Dear sir: Your letter re my application for extension of my temporary stay in this country to hand. In reply to your questions regarding my Canadian Naturalization, may say I was born February 3, 1902, at Hydro, State of Oklahoma, moved with my parents to Mullingar, Saskatchewan in July, 1910, where my father took up a homestead and where he became a citizen of Canada by naturalization when he secured a patent of title to his homestead about the year 1914 or 1915. I do not know the exact date, but could secure it if necessary. His naturalization while I was under age made me a citizen of Canada, and I was never naturalized in my own name. My father still resides at his homestead at the post office, Mullingar, Saskatchewan. I think these records can be secured at the Land Title office, Prince Albert, Saskatchewan. Thanking you, I am Yours Respectfully William Rickets." (over) (On the reverse side) "My father's name is Seigle E. Ricketts, address Mullingar, Sasketchewan." I now show you that letter and ask if you are the person who wrote that? A. Yes, I am.

Q. When and where did you depart from the United States after your entry as a temporary visitor at Laurier, Washington, on June 14, 1937?

A. At Blaine, Washington. [267]

Q. Where did you go in Canada at that time?

A. To Vancouver.

Q. When did you again apply for admission to the United States after your departure to Vancouver on October 25, 1937?

Defendant's Exhibit No. 15—(Continued)

A. Well, it was a few days later. I applied at the American Consul's office in Vancouver I think November 4 or 5.

Q. You didn't apply for admission to the United States at the American Consul's office?

A. Yes, I did. I applied for a visa there. I have never applied at any immigration port at the lines since October, 1937, after applying at the American Consul.

Q. Do you mean that you have never applied at an immigration office for admission into the United States since you left the United States on October 25, 1937? A. Yes.

Q. Is that what you mean? A. Yes.

Q. Were you ever excluded from admission to the United States? A. Yes.

Q. When and where?

A. Vancouver, B. C., October, 1937. You see the purpose of my visit was to apply for a visa to reenter the country as a permanent resident. I went to the American Consul in Vancouver, and he said he would give me a visa, but I had to appear before an immigration board, and they rejected my application and excluded me from the United States. I went before a board of three officers in Vancouver after consulting the American Consul. I applied to the United States Immigration Office in Vancouver, B. C.

Q. Our file contains a rejection notice dated at Vancouver, B. C., on October 26, 1937, listing among others one William Wade Ricketts, age 35, single,

Defendant's Exhibit No. 15—(Continued) restaurant owner, 5'8½", dark brown hair, blue eyes, citizen of Canada, born Hydro, Oklahoma, Scotch race, last permanent residence, Kamloops, B. C., destined to permanent residence, Antler's Grill, Twisp, Washington, excluded as an immigrant alien not in possession of an unexpired consular immigration visa. Are you the person to whom that record refers? A. Yes.

Q. Then you were excluded by an immigration board of special inquiry at [268] Vancouver, B. C., on October 26, 1937. Is that correct? A. Yes.

Q. When did you again enter the United States after your rejection at Vancouver, B. C.?

A. I don't know the exact date—the first week in November, 1937.

Q. Where did you enter the States?

A. At Oroville, Washington.

Q. How did you then travel?

A. I traveled by motor car to the line and walked.

Q. Did you report to an immigration office for Examination by immigration officers?

A. No, I did not.

Q. Were you then examined by United States Immigration officers? A. No.

Q. Well, when you were excluded from the United States at Vancouver, B. C. on October 26, 1937, you were advised that your exclusion would be effective for a period of one year from that date, were you not, during which time you could not lawfully enter the United States without first obtaining

Defendant's Exhibit No. 15—(Continued)

permission from the Secretary of Labor, Washington, D. C. A. Yes.

Q. Then you were further advised that if you did enter the United States unlawfully at any time you would be subject to arrest and deportation upon conviction. Then at the time of your illegal entry at or near Oroville, Washington, in November, 1937, you had full knowledge that you were violating the provisions of the immigration laws of the United States? A. Yes.

Q. Subsequent to that entry to this country were you arrested and deported?

A. Yes, I was.

Q. When was a Warrant of Arrest served upon you by the immigration service?

A. March 3, 1938, at Twisp, Washington.

Q. Were you then subsequently arraigned before a United States Commissioner? A. Yes.

Q. What commissioner?

A. Commissioner Smith at Spokane.

Q. Did you then post a bond or were you confined in the Spokane County Jail?

A. I was confined in the Spokane City Jail for a period of three days, and then I posted bond. [269]

Q. Then what took place in connection with your case?

A. I remained on bond until my case was called on the 6th of June, 1938. I was then sentenced to ten days in jail and deportation.

Q. Where did you have your trial?

Defendant's Exhibit No. 15—(Continued)

A. In the courthouse, District Court, Spokane.

Q. Did you serve your ten days' sentence?

A. Yes.

Q. Then on what date did you leave the United States?

A. I was given a voluntary departure. I was sentenced by Judge Webster, and he gave me a voluntary departure, providing I left the United States within a reasonable time after the ten day sentence which I did. Paid my own way.

Q. Was your bond still in effect until you departed from the United States? A. Yes.

Q. At the time you departed from the United States, however, Warrant of Deportation had been issued in your case, had it not? A. Yes.

Q. When and where did you depart from the United States on that occasion?

A. At Blaine, Washington, June 17, 1938.

Q. At the time you were serving your sentence in the Spokane County Jail for violation of the immigration laws, this office wrote you a letter, a copy of which I will now show you, dated June 6, 1938, bearing file No. 9012/7999, addressed to Mr. William Wade Ricketts, c/o County Jail, Spokane, Washington, advising you that the Assistant to the Secretary of Labor at Washington, D. C. had issued a warrant on March 19, 1938, directing your deportation to Canada upon the grounds that at the time of your entry into the United States at Oroville on or about November 3, 1937, you were not in possession of an unexpired immigration visa, that

Defendant's Exhibit No. 15—
you entered by land at a place oth
nated port of entry for aliens, and
the United States within one yea
of exclusion and deportation, conse
admission not having been grante
letter you were informed that yo
mitted to depart voluntarily or
way without expense to the gov
country of your choice on consent
departure would be verified and co
factory compliance with the terms
but that you would be advised th
under existing law be eligible to
into the United States until after
ing the date of your deportation
the Secretary of Labor has authori
for admission. I now show you a c
and ask if you received such a let

A. No, I never received such a
the provisions of this letter was
to me by Inspector Stewart.

Q. You were in the Spokane
the time that letter was written on

Defendant's Exhibit No. 15—(Continued)
regard to going to the Department of Labor
asking for admission. I knew I had to wait
year, but I didn't know I had to take it to
Department of Labor at Washington.

Q. You mean to say that you did not unders
that after one year from the date of your dep
tion that it was necessary for you to obtain
mission to reapply for admission to the U
States before you could be lawfully admitted to
country?

A. No, I knew I had to apply to an Ame
Consul or to a qualified Immigrant Inspector
I didn't know it had to be taken to the Boar
Labor, Washington. I was under the impressi
could apply at any immigration board within
year from the expiration date, which I had t
in Calgary.

Q. After your voluntary departure unde
order of deportation on June 17, 1938, when
you again enter the United States?

A. In December, the 6th, 1939.

Q. How were you then traveling?

A. I traveled by car.

Q. Where did you cross the border at that t

Defendant's Exhibit No. 15—

A. I traveled by car to the line that, and as to the matter of the m tion of the car I would rather not

Q. How did you travel from t at Babb? A. I hitchhiked.

Q. Isn't it a fact that you dr the States at that time?

A. No, I didn't even own a ca

Q. Exactly, as you can reme you cross the border when you e on that occasion?

A. It was in or near the port line, near the inspection station o

Q. Was it east or west from t

A. East.

Q. Was it in the middle of th

A. Yes.

Q. Did you go to the town of

A. Yes.

Q. Where did you leave this

A. I left the car a couple of m dian side of the line.

Q. Who did you leave it with

Defendant's Exhibit No. 15—(Continued)

Q. Were you examined by United States migration officers at the time?

A. No.

Q. Did you report to the United States im gration office at Babb, or at any other place at time? A. No.

Q. You knew that you should report for ex ination, didn't you? A. Yes.

Q. Why didn't you report then?

A. Because I knew that they would exclude for the reason that I hadn't a passport in my session.

Q. Did you then have in your possession unexpired consular immigration visa?

A. No.

Q. When was the last entry you made into United States from Canada?

A. That was the last entry.

Q. Then at that time or at the time of your entry into the United States from a foreign cou you wilfully and knowingly eluded examinatio immigration officers, did you? A. Yes.

Q. For what purpose were you then comin the United States?

Defendant's Exhibit No. 15—(Continued)

Q. What kind of business did you have?

A. Cafe.

Q. What was the name of your cafe?

A. The Kinema Lunch.

Q. At what place?

A. I forget the exact street address—14th Avenue West, Calgary.

Q. When did you go into that business?

A. In May, 1939.

Q. When did you go out of business at that place? A. In October, 1939.

Q. Were you employed between October, 1939 and December 6, 1939?

A. Yes, I was employed at times.

Q. Who were you employed by during that time?

A. I was employed by the Coffee Cup Cafe, Calgary, Alberta. It was only for a short period.

Q. Who was your last employer in Canada?

A. I can't give you his name. That was the last employer—manager of the Coffee Cup.

Q. Have you remained continuously in the United States since December 6, 1939?

A. Yes.

Q. What was your destination at that time?

A. Spokane.

Q. Did you come to Spokane immediately after your entry? A. Yes.

Q. By whom were you first employed at Spokane subsequent to December 6, 1939?

A. My first employer was at Colville, Washington, after my arrival here in Spokane.

Defendant's Exhibit No. 15—(Continued)

Q. Who were you employed by at Colville?

A. I'm not positive about his name—Ernest Winkie I believe—at Colville, Washington.

Q. What kind of work were you doing for him?

A. I was cutting wood.

Q. During what period were you employed by him?

A. It was about thirty days during the months of November and December, the latter part of November and December. No it was in December—about twenty days.

Q. Then where did you go?

A. I went to Marcus, Washington.

Q. Were you employed at Marcus?

A. I also cut wood.

Q. Who were you employed by at Marcus?

A. Tom Johnson.

Q. How long were you employed by him and during what period?

A. From about the first of the year 1940 until the first of May, 1940.

Q. Then where did you go?

A. I returned to Spokane.

Q. Were you employed here in Spokane?

A. No, I remained in Spokane unemployed for four or five days. Then I worked for Addison-Miller, boarding contractors for the Great Northern.

Q. Where were you employed by Addison-Miller?

A. I was employed on the line of the Great Northern running from Spokane to Wenatchee and

Defendant's Exhibit No. 15—(Continued)

also on the Great Northern line from Wenatchee to Okanogan, then I worked as a cook for an extra gang.

Q. How long were you employed on that job?

A. About three months. In July sometime of 1940.

Q. Then what did you do?

A. I visited with friends and I remained unemployed in Spokane for a period of twenty or thirty days.

Q. Where was your next employment?

A. At Liberty Lake. I sawed logs out there for Ernest McCall.

Q. During what period were you employed there?

A. For the month of August, 1940, I guess.

Q. Then what did you do?

A. I returned to Spokane, and then I went out to work for Ernest Graft, logging operator at Coeur d'Alene, Idaho. I worked for him during September of 1940. Then I took sick and returned to Spokane again.

Q. Were you in the hospital under a doctor's care?

A. No, I just had the flu for four or five days. Then I worked for the Costello Brothers in Spokane on Sprague Avenue. They have a cafe—Costellos' Tavern.

Q. How long were you there?

A. I was just there through the month of October, 1940. From there I left and immediately went

Defendant's Exhibit No. 15—(Continued)

out to work at Creston, Washington, for Gene Boyd in the Associated Stations until the first of the year 1941. Then I returned to Spokane and worked for Vi Nims, Nims No. 2 for a period of some weeks. Then I went immediately to Coulee Junction, Washington, and I worked for Thell Reed until March 16, 1941. Then I returned to Spokane and leased the Main Avenue Cafe, Main Avenue, Spokane. I operated that from March 16 until May 16, 1941, and I was idle for a period of a week or ten days. Then I took employment with the Ideal Cafe, Newport, Washington, and I worked there until August 4, 1941. Then I went to Metaline Falls and leased Metaline Falls Cafe, and I operated that until January 25, 1942. I sold my business and came to Spokane and was employed for a couple of weeks. Then I bought the Empire Cafe at 110 North Division Street, and I have operated that since the 4th of February, 1942.

Q. I now show you a picture taken at the sheriff's office, Spokane, Washington, on March 3, 1938, of one William Wade Ricketts who departed voluntarily from [275] the United States under an order of deportation at Blaine, Washington, on June 17, 1938, and ask you if that is a picture of yourself? A. Yes, that is.

Q. Mr. Ricketts, have you ever been lawfully admitted into the United States as an alien for permanent residence? A. No.

Q. Have you been arrested at any time except

Defendant's Exhibit No. 15—(Continued)

when you were arrested on the immigration violation? A. No, never.

Q. Were you ever excluded from admission to the United States except by the Board of Special Inquiry at Vancouver, B. C., on October 26, 1937?

A. No.

Q. Are divorce proceeding now pending between you and your wife? A. Yes.

Q. Where were you residing between August, 1940, and January, 1941?

A. I was residing in Metaline Falls.

Q. Have you registered as an alien in compliance with the Alien Registration Act of 1940?

A. No.

Q. Why didn't you register as required by that Act?

A. I'd rather not answer that question.

Q. You had knowledge of the law in that respect, didn't you? A. Yes.

Q. Did you serve in the Armed Forces of any country? A. No.

Q. Did you ever homestead in Canada in your own name? A. No.

Q. Outside of the one occasion which you have previously mentioned, did you ever vote in Canada?

A. No.

Q. Mr. Ricketts, have you registered under the Selective Service Act? A. Yes.

Q. Do you have your registration card now in your possession?

A. Yes. (Presents registration certificate certi-

Defendant's Exhibit No. 15—(Continued)

fying that in accordance with the Selective Service Proclamation of the President of the United States, William Wade Ricketts, 110 North Division, Spokane, Washington, [276] was duly registered on February 15, 1942, Edith L. Manchester, signature of registering registrar for Local Board No. 4, Spokane, Washington. Description of registrant 5′ 8″ 148 pounds, blue eyes, dark brown hair, sallow complexion, split right index finger on right hand.)

Q. Are you the person to whom this card refers?

A. Yes.

(Card returned to alien)

True and correct transcript.

MARY M. SEELEY
Clerk-Stenographer. [277]

DEFENDANT'S EXHIBIT No. 17

Deportation Proceedings

In re: William Wade Ricketts alias Ward Richards alias Walter Richards.

Hearing Reopened:

Date: August 2, 1943

Place: Spokane, Washington

Presiding Inspector: James E. Sullivan

Secretary: James E. Sullivan

Examining Inspector: None

Alien's representative: None

Defendant's Exhibit No. 17—(Continued)

Presiding Inspector To Alien:

Q. Will you stand and raise your right hand. Do you solemnly swear to tell the truth, the whole truth and nothing but the truth, so help you God?

A. I do.

Q. What is your full and correct name?

A. William Wade Ricketts.

Q. At this reopened hearing you have the right to be represented by counsel at your own expense if you so desire. Do you wish to be represented by counsel? A. No.

Q. You are informed that if you knowingly and wilfully give false testimony at this hearing you may be prosecuted for perjury, the penalty for which is five years imprisonment or $2,000 fine, or both such fine and imprisonment. Do you understand? A. Yes.

Q. Are you the same William Wade Ricketts whose hearing under warrant of arrest was started at this office on July 27, 1943, and who stated then that he desired to apply for the privilege of departing voluntarily from the United States in lieu of deportation? A. Yes.

Q. At that time you were furnished Forms I-255, Application for suspension of Deportation, Departure in lieu of Deportation, Preexamination in Deportation Cases, and Forms I-55, General Information Form, on which to make [283] application for voluntary departure in lieu of deportation. Have you executed those forms?

Defendant's Exhibit No. 17—(Continued)

A. Yes. (Presents Forms I-55 and I-255 executed by William Wade Ricketts)

Q. Have you completely answered all questions appearing on these forms, and are your answers thereto correct? A. Yes.

Q. For identification purposes the Form I-255 which you have executed and presented here will be marked Exhibit 2, and the Form I-55 which you presented as Exhibit 3, and each will be attached to and made a part of the record of hearing in your case, and you are warned that any statements made by you in your application on Form I-255, Application For Voluntary Departure, or in the General Information Form I-55, may be used as evidence in any proceeding to determine your right to enter, reenter, pass through or reside in the United States, and that false answers to any of the questions in such application or general information form may bar you from the relief you request. Do you understand? A. Yes.

Q. Exactly where and when were you born?

A. Hydro, Oklahoma. February 3, 1902.

Q. Do you have a birth certificate or any evidence of your birth?

A. Yes. I have an affidavit here.

(Presents affidavit reading as follows: "This is to certify that William Wade Ricketts, the bearer of this statement is my legal son (Mother's maiden name, Emma Shepard) Was born in the village of Hydro, Oklahoma, February 3rd, 1902. That I was formerly a native born

Defendant's Exhibit No. 17—(Continued)
American of American parents of Scotch Irish descent, but I am now a citizen of Canada through naturalization, having taken citizenship papers in Canada when the said William Wade Ricketts was a minor child." Signed, Seigel E. Ricketts. "Subscribed and sworn to before me this 14th day of December, 1937." Signed, Ernest W. Wilson, a Notary Public & Justice of the Peace in and for the Province of Saskatchewan.)

Q. Who is the Seigel E. Ricketts who executed and signed that affidavit? A. My father.

Q. Of what country are you now a citizen or subject? A. Canada. British Subject.

Q. How and when did you become a citizen of Canada?

A. Through my father's naturalization when he took out citizenship papers [284] when I was a minor child, about 1915.

Q. I have a letter here on the stationery of the Department of the Secretary of State, Naturalization Branch, Ottawa, Canada, which is in answer to inquiry of this office as to the date of the naturalization in Canada of Seigle Ricketts. In this letter it is indicated that one Siegel E. Ricketts of Mullingar, Sask., was naturalized in Canada December 31, 1914, at Battleford, Saskatchewan. Will you inspect this letter and state whether or not you believe the record of naturalization covered by this letter refers to the naturalization in Canada of your father? (Respondent inspects letter.)

Defendant's Exhibit No. 17—(Continued)

A. That is correct. That is my father.

Q. Copies of this letter have been made and will be marked Exhibit 4 for identification purposes, and attached to the record of hearing in your case. Do you understand? A. Yes.

Q. Do you have any comment to make on this exhibit?

A. No, only that the information in that letter is correct. I put it down wrong on the application forms. That's a long time to remember.

Q. Were you living in Canada with your father at that time? A. Yes.

Q. How old were you at that time?

A. 12 years old.

Q. Is it on the basis of that naturalization that you claim to be a citizen of Canada? A. Yes.

Q. Did you ever apply for naturalization in Canada in your own right? A. No.

Q. Did you, in Canada, have all the rights and privileges of a Canadian citizen? A. Yes.

Q. In what way?

A. In the matter of voting for one.

Q. Did you hold public office in Canada?

A. Yes.

Q. What office did you hold?

A. School trustee and Counsellor of the Municipality. That's the same as a [285] County Commissioner here.

Q. In what municipality was that?

A. Round Hill, Saskatchewan.

Q. Was that an elective post? A. Yes.

Defendant's Exhibit No. 17—(Continued)

Q. Did you have to be a citizen of Canada to hold that position? A. Yes.

Q. What year or years did you serve in that capacity?

A. The years of 1918 and 1919, I believe it was. In those days, it was up in the homestead country, and there one became of age at 18. They can hold office at 18. I had passed my 18th birthday, and it was 1921 or 22 I served as school trustee.

Q. Do you have to be a citizen of Canada to be a school trustee? A. Yes.

Q. Did you at that time always consider yourself to be a citizen of Canada? A. Yes.

Q. It was 1923 that you became 21 years of age?

A. Yes.

Q. Did you at that time consider yourself to be a citizen of Canada? A. Yes.

Q. Did you have any intention at that time of returning to the United States to reside?

A. No.

Q. Did you consider yourself to be a citizen of the United States at that time?

A. I believe according to the acts at that time I was. It was at one time explained to me by an immigration officer that after residing in the United States for a period of 60 days or so I become an American citizen again.

Q. Upon attaining your majority though it appears that you elected to retain the citizenship acquired by you through the naturalization of your father in Canada, does it not? A. Yes.

Defendant's Exhibit No. 17—(Continued)

Q. You intended when you become of age to remain in Canada indefinitely, and assumed the rights and privileges of a Canadian citizen?

A. Yes. [286]

Q. How many times have you voted in Canada?

A. I have only voted once in the general elections. The municipal and school, voting in those you have to have the same qualifications, of course, that you do in the primary or general elections, but you don't prescribe to any party.

Q. You have voted in school and municipal elections?

A. Yes, several times. Voting for school trustees and officers of the municipality.

Q. Have you voted more than once in the general election in Canada?

A. No. I was moving around so much I didn't have time to get my name in the registration. I voted in the Provincial election in 1927, I think, but I never voted in the Dominion election.

Q. Wasn't there a Dominion election in 1927 also?

A. No. The Dominion election was 1930. I tried to vote at that time but they refused me because I was out of my home constituency. I think the Dominion elections were in 1925 and 1930.

Q. Did you vote in 1925? A. No.

Q. And the only reason you didn't vote in 1930 was because you were not in the constituency where you were registered? A. Yes, that's true.

Q. After 1930 did you vote in any election?

Defendant's Exhibit No. 17—(Continued)

A. No, after that I decided to leave Canada.

Q. What issues were involved in the Provincial election that you voted in in 1927?

A. I don't think any main issue was at stake.

Q. What officials were elected?

A. The Premier and the members of the Provincial Legislature.

Q. The issue involved was who would rule in the Province of Alberta?

A. Yes, I think you would call it an election to determine who would be the chief executive of the Province of Alberta.

Q. Were any Dominion legislators elected?

A. No.

Q. Only citizens of Canada could vote in that election? A. Yes.

Q. Was your vote ever questioned in Canada on the grounds of citizenship? A. No. [287]

Q. Were you in Alberta when Eberhart first ran? A. Yes.

Q. Did you vote at that time? A. No.

Q. Did you ever vote in the United States?

A. No.

Q. Did you ever serve in the military forces of Canada? A. No.

Q. Did you ever file on a homestead?

A. No.

Q. Did you ever take any oath of allegiance in connection with the office you held in Canada?

A. No.

Defendant's Exhibit No. 17—(Continued)

Q. Did you ever take any oath of allegiance in Canada? A. No.

Q. Did you ever teach school? A. No.

Q. Did you exercise the rights of a Canadian citizen in any other way than those you have heretofore mentioned? A. No.

Q. Have you ever travelled on a Canada or British passport? A. No.

Q. When did you first go to Canada?

A. 1910.

Q. Who did you go to Canada with at that time?

A. My father and mother.

Q. The record shows your father's name was Seigel E. Ricketts. What was your mother's name?

A. Her maiden name was Emma Shepard.

Q. Where was your father born?

A. Red Oak, Iowa.

Q. And your mother?

A. Peoria, Illinois.

Q. Are either of them living now? A. No.

Q. Where and when did they die?

A. They both died at Mullingar, Saskatchewan. The exact dates I can't give [288] them. Mother died in 1937 and my father a year later.

Q. Did either of your parents ever return to the United States to reside after going to Canada in 1910? A. No.

Q. Where are they buried?

A. Mayfair, Saskatchewan.

Q. Have you made various trips to the United States since you went to Canada in 1910?

Defendant's Exhibit No. 17—(Continued)

A. Yes.

Q. On the occasion of your entry to the United States what citizenship have you claimed?

A. I have never been asked to declare my citizenship when crossing the border. Now I will take that back. I don't think I was asked my citizenship until I crossed at Oroville. Inspector Brunner asked my citizenship in 1936.

Q. Weren't you asked every time you crossed of what country you were a citizen?

A. No, just where I came from and where I was going.

Q. On your return to Canada were you asked of what country you were a citizen? A. Yes.

Q. What did you state to the Canadian officers?

A. That I was a Canadian.

Q. Did you always consider yourself to be that?

A. Yes.

Q. When was the last time you entered Canada?

A. June, 1938.

Q. Did you claim at that time to be a Canadian citizen?

A. No. That was when I was deported and the Canadians held me up until the deportation paper came through. I have never claimed to be a Canadian citizen since that.

Q. When you entered the United States at Oroville in 1936 did you claim to be a Canadian citizen?

A. Yes. I was told I was.

Q. When did you first return to the United States after you went to Canada in 1910?

Defendant's Exhibit No. 17—(Continued)

A. June, 1926.

Q. Were you returning to the United States at that time to reside permanently? A. No.

Q. How long did you remain in the United States?

A. About two months. No, less than that. Just over a month.

Q. Were you admited as a Canadian citizen at that time? A. Yes.

Q. Did you make claim to United States citizenship at that time? A. No.

Q. Where did you enter the United States?

A. Eastport, Idaho.

Q. Where did you next enter the United States?

A. The same year. In December, 1926, at Eastport.

Q. Did you intend to remain permanently in the United States at that time? A. No.

Q. How long did you remain?

A. About six months.

Q. Did you pay head tax at that time?

A. No.

Q. Did you claim to be a Canadian citizen at that time?

A. I have never been asked to declare my citizenship. They just asked where I came from and where I was going, but I have never been asked except the once.

Q. Did you consider yourself to be a Canadian citizen at that time? A. Yes.

Defendant's Exhibit No. 17—(Continued)

Q. Were you coming to the United States then for a temporary period? A. Yes.

Q. With the intention of returning to your home in Canada? A. Yes.

Q. Did you return to Canada at the end of six months? A. Yes.

Q. What were you doing in the United States?

A. Visiting and working.

Q. When did you next return to the United States? A. September, 1936.

Q. You were not in the United States between 1927 and 1936? A. No.

Q. Did you remain in Canada all that period?

A. Yes.

Q. Did you at any time apply for admission to the United States within that [290] period?

A. No.

Q. Have you ever made claim to United States citizenship?

A. No. I have never filed any claim to United States citizenship. I have asked to be granted citizenship or a visa to be granted citizenship?

Q. Have you always considered yourself to be a citizen of Canada since you were naturalized through your father? A. Yes.

Q. Have you ever applied for admisison at the border as a United States citizen? A. No.

Q. Have you ever applied for admission at the with the intention of claiming United States citizenship and assuming the rights and duties of a United States citizen? A. No.

Defendant's Exhibit No. 17—(Continued)

Q. What was the date of your entry at Oroville?

A. I believe September 10, 1936.

Q. Were you coming to the United—then as a visitor? A. Yes.

Q. Were you admitted as a Canadian citizen for a temporary period? A. Yes.

Q. For how long a period were you admitted?

A. 30 days.

Q. How long did you stay?

A. I stayed pretty near six months. I got an extension. I didn't depart until the next June.

Q. When you entered the United States at Oroville did you intend to return to your home in Canada? A. Yes.

Q. After you returned to Canada in June, 1937, how long did you remain there?

A. About two weeks.

Q. Where did you enter the United States then?

A. Laurier, Washington.

Q. We have a record here to the admission at Laurier, Washington on June 14, 1937 of one William Ricketts, occupation farmer, citizen of Canada, Scotch race, born Hydro, Oklahoma, last permanent residence, Kamloops, B. C., where he had sister Grace Ricketts, destined to friend, Richard Horn, Twisp, Washington [291] to visit three months. Would that be a record of your admission at Laurier, Washington?

A. Yes, but that wasn't my sister; that was my aunt in Kamloops.

Defendant's Exhibit No. 17—(Continued)

Q. How long did you remain in the United States after that entry?

A. About three and one half months.

Q. When you entered at Laurier did you intend to return to Canada? A. No.

Q. Was it your intention to remain permanently in the United States at that time? A. Yes.

Q. Did you return to Canada thereafter?

A. Yes.

Q. What were the circumstances which caused your return?

A. I returned to Canada to see the American Consul in Vancouver, B. C. to see about securing a visa to reenter the United States as a permanent resident.

Q. Did you secure a visa? A. No.

Q. Where did you next apply for admission to the United States? A. Vancouver, B. C.

Q. We have a record of the exclusion from admission to the United States at Vancouver, B. C. on October 26, 1937 of one William Wade Ricketts, age 35, single, restaurant owner, citizen of Canada, Scotch race, born Hydro, Oklahoma, last permanent residence Kamloops, destined to Twisp, Washington for permanent residence, excluded as an immigrant alien, not in possession of an unexpired consular immigration visa. Would that record apply to you? A. That's it.

Q. Did you subsequently enter the United States? A. Yes.

Q. When?

Defendant's Exhibit No. 17—(Continued)

A. About November 6, 1937, as near as I can remember.

Q. Did you enter lawfully at that time?

A. No.

Q. Were you subsequently apprehended by immigration officers and deported from the United States? A. Yes. [292]

Q. What was the date of your deportation?

A. June 17, 1938.

Q. Our file indicates that one William Wade Ricketts, Central Office File No. 55973/230, was deported from the United States through the port of Blaine, Washington on June 17, 1938, on the following charges: The Act of 1924, in that at the time of entry he was not in possession of an unexpired immigration visa; and the Act of 1917, in that he entered by land at a place other than a designated port of entry for aliens; and the said act as amended by the act of March 4, 1929, in that he entered the United States within one year from the date of exclusion and deportation, consent to reapply for admission not having been granted. Would that record of deportation refer to you?

A. Yes sir.

Q. Subsequent to your deportation from the United States on June 17, 1938, did you apply for and receive permission from the Secretary of Labor or Attorney General at Washington, D. C. to reapply for admission after deportation?

A. No.

Q. How long did you remain in Canada after

Defendant's Exhibit No. 17—(Continued)

your deportation from the United States on June 17, 1938? A. Until December 6, 1939.

Q. Where did you enter the United States then?

A. At Babb, Montana.

Q. Were you inspected by United States immigration officers at that time? A. No.

Q. How did you enter the United States?

A. I walked across the line.

Q. Was it in daylight or after dark?

A. After dark.

Q. Did you intentionally elude inspection by immigration officers?

A. Yes. I knew I wouldn't be admitted.

Q. Were you coming to the United States to remain permanently at that time? A. Yes.

Q. To what place were you destined in the United States?

A. Spokane, Washington.

Q. Did you then have in your possession a valid consular immigration visa? [293] A. No.

Q. Did you pay a head tax? A. No.

Q. Have you ever paid a head tax when entering the United States. A. No.

Q. Have you ever had an immigration visa in your possession when entering the United States?

A. No.

Q. Have you ever been issued such document by an American Consul? A. No.

Q. What time of night was it that you entered at or near Babb, Montana?

A. Approximately 9 o'clock at night.

Defendant's Exhibit No. 17—(Continued)

Q. Did you cross at or near the immigration office?

A. I walked around the immigration station.

Q. How far from the immigration station?

A. I should judge half a mile.

Q. Was it your intention before arriving at the border to enter surreptitiously? A. Yes.

Q. Were you aware at that time that you were violating the law in so doing? A. Yes.

Q. Had you been warned before you left the United States under warrant of deportation that you would be subject to fine and imprisonment if you reentered the United States unlawfully?

A. Yes.

Q. Were you assisted in entering the United States, or accompanied by anyone? A. No.

Q. How did you get to the border?

A. By bus to Cardston, Alberta and I hitchhiked and walked the rest of the way.

Q. Did you get a ride at all?

A. Yes. On the Canadian side.

Q. Was it someone that you knew that gave you the ride? A. No, a stranger.

Q. Did he pick you up on the American side after you crossed?

A. No. I walked all the way into Browning then.

Q. Did you come to Spokane then?

A. Yes.

Q. Have you been residing in Spokane ever since that time?

Defendant's Exhibit No. 17—(Continued)

A. No. I worked in and out of Spokane. [294]

Q. Who was your last employer in Canada?

A. Fred Arnold, Irricanna, Alberta.

Q. What did you do for him?

A. Farm hand in the spring of 1936 for approximately three months.

Q. Have you been employed by anyone in Canada for any length of time?

A. Martin Jensen, Ensign, Alberta for three years, from 1926, with the exception of the time I was down here, for three years, and Richard Parslow, Vulcan, Alberta for approximately three years, 1930 to 1934.

Q. What was your last address in Canada before coming to the United States?

A. Calgary, Alberta.

Q. What were you doing in Canada between the time you were deported and the time you last entered the United States?

A. I ran a lunchroom at Rosslyn, B. C., The Allan Grill, from June until November of 1938, and then the Kinema Lunch in Calgary from the spring of 1939 until the fall of 1939.

Q. Have you been back to Canada any time since your entry in 1939? A. No.

Q. Have you been arrested or in trouble with the police at any time or anywhere, including in Canada?

A. No. The only occasion was on this immigration matter.

Q. Of what race of people are you descendant?

Defendant's Exhibit No. 17—(Continued)

A. Scotch.

Q. What is your occupation?

A. Cafe operator, or cook.

Q. Do you own and operate a business?

A. Yes.

Q. What is the name and location of your business?

A. Empire Cafe. 110 North Division, Spokane, Washington.

Q. How long have you been operating that cafe?

A. Since February 16, 1942.

Q. What income do you derive from that business?

A. I am listed there at $125.00 a month. Sometimes I make, sometimes I don't.

Q. Do you own any property in the United States or Canada?

A. None in Canada. Some personal property in the United States.

Q. What is the value of your personal property?

A. Approximately $2,000.

Q. Do you have money in the bank? [295]

A. Yes, approximately $750.00.

Q. Do you own any stocks or bonds?

A. No.

Q. Do you have any war bonds? A. No.

Q. Do you have any debts owing you or which you owe others? A. Owing me, yes.

Q. How much have you owing you?

A. Roughly $500.00. Might be more, might be less.

Defendant's Exhibit No. 17—(Continued)

Q. Are they collectible?

A. Part of them are.

Q. Do you have any lawsuits pending against you or pending against anyone else?

A. Not against me. I have a judgment against another man.

Q. In the event you were ordered deported how long would it take for you to put your affairs in order? A. Two weeks or thirty days.

Q. Are you married? A. No.

Q. Have you ever been marired? A. Yes.

Q. How many times? A. Once.

Q. When, where and to whom were you married?

A. Edith B. Ryan, October 31, 1941, at Coeur d'Alene, Idaho.

Q. How did that marriage terminate?

A. Divorce.

Q. Who secured the divorce?

A. My wife.

Q. On what grounds? A. Desertion.

Q. Are you paying alimony? A. No.

Q. Was any ordered by the Court?

A. No.

Q. When was the divorce granted?

A. April 1, 1942. [296]

Q. Do you have any children? A. No.

Q. Do you have anyone dependent upon you for support? A. No.

Q. Have you ever been on relief? A. No.

Defendant's Exhibit No. 17—(Continued)

Q. Have you ever been confined in any hospital or mental institution for treatment? A. No.

Q. Are you now in good health?

A. Yes.

Q. Do you have any relatives in the United States?

A. Yes, a brother, Wayne C. Ricketts, Winlock, Washington. That's all.

Q. What relatives have you in Canada?

A. I have six brothers and an aunt.

Q. What are your brother's names and addresses?

A. Clyde C. Ricketts, address Meeting Lake, Saskatchewan; Boyd C. Ricketts, address unknown, in Canada; Noel G. Ricketts, Mullingar, Saskatchewan; F. Glen Ricketts, Calgary, Alberta, street address unknown; Roy R. Ricketts, Canada, address unknown; Claude C. Ricketts, Canada, address unknown. Aunt, Grace E. Ricketts, Kamloops, B. C. That's where she was the last I knew of her.

Q. Is that all? A. Yes.

Q. Did you attend school in Canada?

A. Yes. Misterton School at Mullingar, Saskatchewan.

Q. How many grades did you attend there?

A. Eight.

Q. Did you attend any other school?

A. I attended the Eastend school at Hydro, Oklahoma, before I went to Canada.

Q. What is the highest grade you completed?

Defendant's Exhibit No. 17—(Continued)

A. Eighth.

Q. Were you baptized?

A. No, not to my knowledge.

Q. Did you attend any church in Canada?

A. Yes, the Presbyterian Church Calgary. [297]

Q. When did attend there?

A. In 1939 was the last time I attended service there. I am not a very regular church goer.

Q. Did you register for selective service?

A. Yes.

Q. With what board are you registered?

A. Board No. 4, Spokane, Washington.

Q. In what draft class are you now?

A. 4-H.

Q. Have you been called for service at all?

A. Yes.

Q. When?

A. November 11, 1942, and December 6, 1942.

Q. What disposition was made of you at that time?

A. I was called for examination. I wasn't called for service. I was 1-A and was called the 6th of last December and my class changed and they told me not to appear. I guess you can say I never have been called. They called me once for medical.

Q. Were you turned down for medical reasons?

A. No. I was over 38.

Q. Do you have any objections to serving in the armed forces of the United States? A. No.

Q. Have you ever belonged to the Communist Party? A. No.

Defendant's Exhibit No. 17—(Continued)

Q. Have you ever belonged to the German Bund or any organization of a similar nature?

A. No.

Q. The hearing in your case will be adjourned at the present time to a future date inasmuch as you have applied for the privilege of departing voluntarily from the United States in lieu of deportation in order that a character investigation may be conducted in your case and made a part of the record of hearing. You will be notified when to appear. Do you expect to be at the same address indefinitely? A. Yes. [298]

Q. In the event you change your address will you so notify this office? A. Yes.

Hearing concluded.

I certify that the foregoing is a true and correct transcript of my stenographic notes taken in this hearing.

JAMES E. SULLIVAN,
Presiding Inspector. [299]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter coming on before the above-entitled Court for hearing on the 30th of September, 1946, and the plaintiff being represented by George W. Young, his attorney, and the defendant being represented by Harvey Erickson, United States Attorney

for the Eastern District of Washington, and the Court having heard the testimony introduced, the arguments of counsel, and having on the 2nd day of October, 1946 announced an oral opinion in the above-entitled cause, from the evidence introduced herein the Court makes the following

FINDINGS OF FACT

I.

That the petitioner or plaintiff herein is not a resident of the City of Spokane, County of Spokane, State of Washington, or a resident of the Eastern District of Washington, as the term "Resident" is defined in Title 8, Section 903, U.S.C.A.

II.

That the action set forth in plaintiff's petition was brought by virtue of the provisions of Title 18, Section 903, U.S.C.A., and other applicable provisions of law relating to declaratory judgments to determine nationality.

III.

That the petitioner was born at Hydro, Oklahoma, on February 3, 1902.

That the father of the petitioner was Siegel Ricketts, who was born in the State of Indiana, and that his mother was Emma Shepard prior to her marriage to his father, and she also was born in the United States.

V.

That Siegel Ricketts, the father of the petitioner, was naturalized in the Dominion of Canada on December 31, 1914, and that the petitioner was a minor child residing in Canada with his father at the time of his naturalization, and was on said date 12 years, 10 months and 29 days of age.

VI.

That on February 2, 1923, the petitioner became 21 years of age, and then lived in the Dominion of Canada. That the petitioner did not return to the [300] United States until about November, 1925. He remained in the United States for a period of six months, and then returned to the Dominion of Canada, and again entered the United States in 1926 and stayed for a period of about five months, and then returned to Canada and stayed until 1936 when he again entered the United States. That since said time the petitioner has remained in the United States more or less constantly.

VII.

That during the time petitioner resided in the Dominion of Canada, he held elective offices as school trustee and counselor to the municipality of Round Hill, Saskatchewan, during the years 1919 and 1920.

VIII.

That the petitioner after February 2, 1923, when

he became 21 years of age, had ample opportunity to return to the United States, and failed and neglected to do so for a period of two years and eight months after attaining his majority. Thereafter, he only lived in the United States for a period of about 11 months until 1936, and that the petitioner made no effort prior to 1936 to claim, maintain or reestablish his citizenship as a United States National from the date of his majority until his entry into the United States during 1936, and that he did affirmatively elect to abandon such United States citizenship as he had at the time of attaining his majority in Canada in 1923 and continuously thereafter for a period of thirteen or fourteen years.

Dated this 5th day of November, 1946.

SAM M. DRIVER,
United States District Judge.

Presented by:

HARVEY ERICKSON,
United States Attorney.

Approved by:

.....
Attorney for Plaintiff.

From the foregoing Findings of Fact, the Court makes the following

CONCLUSIONS OF LAW

I.

That judgment be entered dismissing the plaintiff's petition. [301]

II.

That the plaintiff at this time is not a citizen of the United States.

III.

That the defendant be awarded its costs and disbursements in the above-entitled action in the sum of ..... dollars.

Dated this 5th day of November, 1946.

SAM M. DRIVER,
United States District Judge.

Presented by:

HARVEY ERICKSON,
United States Attorney.

Approved by:

.....
Attorney for Plaintiff.

Filed Nov. 5, 1946. A. A. LaFramboise, Clerk.

[Title of District Court and Cause.]

JUDGMENT

This matter coming on for hearing before the above-entitled Court on the 30th day of September, 1946, the plaintiff being represented by George W. Young, his attorney, and the defendant being represented by Harvey Erickson, United States Attorney, and the Court having heard the testimony introduced, argument of counsel, and having rendered his oral opinion and made his Findings of Fact and Conclusions of Law, and it appearing to the satis-

faction of the Court that the petitioner, or plaintiff, William Wade Ricketts was born in Hydro, Oklahoma, on February 2, 1902; that when a minor in about the year 1910 his father and mother moved to the Dominion of Canada, and that his father was naturalized as a British subject on December 31, 1914, at which time the petitioner was 12 years, 10 months and 29 days of age, and that the petitioner resided in Canada constantly until his 21st birthday on February 2, 1923 and constantly thereafter for a period of about two years and [302] eight months after attaining the age of majority, and that the petitioner came to the United States in the first instance about February 1925 and stayed for a period of six months, and returned to Canada at the expiration of the six months, and after six months again returned to the United States and stayed within the United States for five months and then returned to Canada and stayed for a period of about ten years, or until 1936, and that the petitioner in the first 14 years after he attained his majority only resided in the United States for a period of about 11 months, and during his minority in Canada, during the years 1919 and 1920, he held an elective school office at Round Hill, Saskatchewan, and voted in Canada at a provincial election in 1927, and attempted to vote in a Dominion election in 1930, and plaintiff, or petitioner, made no effort to elect to become an American citizen until about 1936 when he moved to the United States; it is, therefore, by the Court,

Ordered, Adjudged And Decreed that the action instituted by the plaintiff, seeking to be declared

a citizen of the United States, be dismissed, and that the plaintiff take nothing by this action, and that the plaintiff be declared not to be a citizen of the United States, and

It Is Further Ordered that the defendant have judgment against the plaintiff for costs in this action in the sum of ..... dollars.

Dated this 5th day of November, 1946.

SAM M. DRIVER,
United States District Judge.

Presented by:

HARVEY ERICKSON,
United States Attorney.

Approved by:

.....
Attorney for Plaintiff.

Filed Nov. 5, 1946. A. A. LaFramboise, Clerk.

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

Plaintiff, William Wade Ricketts, moves the Court for a new trial on the following grounds, to-wit: [303]

1. Newly discovered evidence, material for the plaintiff, which he could not with reasonable diligence, have discovered and produced at the trial.

2. Insufficiency of the evidence to justify the decision, as follows:

(a) Absence of evidence of affirmative acts on

the part of plaintiff showing intention to become expatriated;

(b) Continuity of claim of U. S. citizenship accompanied by entry into the U. S. following majority with knowledge and acquiescence of immigration authorities, together with avowed intention to take up residence therein apparently disregarded.

(c) Fact of resumption of residence in U. S.; presumption of permanent residence in U. S. following majority apparently ignored.

(d) Intent to claim U. S. citizenship following attainment of majority, accompanied by affirmative acts in support of such intent, not accepted.

3. Error in law occurring at the trial as follows:

(a) The judgment of the Court reflects failure to distinguish domicile from intentional claim of citizenship following plaintiff's attainment of his majority.

This motion is made in conformity with Federal Rules of Civil Procedure, 59-A, sub-division 2, and is based upon all of the records and files herein, the testimony already adduced, and the affidavits of Wayne Ricketts, Irene Margaret Ricketts, and William Wade Ricketts, hereunto annexed and by this reference made a part hereof.

GEO. W. YOUNG,
Attorney for the Plaintiff.

Copy received this 13th day of October 1946.

FRANK R. FREEMAN,
Attorney for Defendant.

Filed Nov. 13, 1946. A. A. LaFramboise, Clerk.

Napavine, Wn.
Oct. 14, 1946.

Dear Sir:

To the best of my knowledge I swear that the statements of William Wade Ricketts, my brother, are true. That I do know that he had claimed his desire at all time of being an American citizen & that he did stay & helped his parents in 1921 & 1922. He was married in 1923 and could not come then, but when he did come later they stayed with me & she insisted on going back to Canada & my brother tried his best to talk her into staying & she refused. I came home for a short visit in 1922 & Wade told me then that he didn't want to stay in Canada & never had cared about becoming a Canadian citizen.

Yours truly.

/s/ WAYNE RICKETTS
Napavine, Wn.

Subscribed and sworn to before me this 14th day of October, 1946.

(Notarial Seal) DORIS BOND,
Notary Public in and for the State of Washington,
residing in Chehalis. County of Lewis.
Witness:
LESLIE E. HUGHES

Canada,
Province of Saskatchewan—to wit:

In The Matter Of the citizenship of William Wade Ricketts of Spokane, in the State of Wash-

ington, one of the United States of America, Restaurant Proprietor,

I, Irene Margaret Ricketts of the Hamlet of Bapaume in the Province of Saskatchewan, Married Woman. [305]

Do Solemnly Declare That I am the wife of the above named William Wade Ricketts.

1. That in the Fall of the year 1926 I believe, I went to said Spokane, with the said William Wade Ricketts, and when we crossed the line between the Dominion of Canada and the said United States of America, the said William Wade Ricketts claimed to be an American Citizen and informed the immigration official to this effect and the said official let the said William Wade Ricketts pass as an American Citizen into the said United States of America, and stated that Gordon Ricketts our son was also an American Citizen by virtue of the citizenship papers of his father—the said William Wade Ricketts. I stayed at that time in Spokane aforesaid the Winter of 1926 and left for the said Dominion of Canada in the following Spring owing to illness.

2. The said William Wade Ricketts has always claimed to be a citizen of the said United States of America.

And I Make this solemn declaration conscientiously believing it to be true, and knowing that it is of the same force and effect as if made under oath, and by virtue of The Canada Evidence Act.

IRENE MARGRET RICKETTS

Declared before me at the Village of Spiritwood in the Province of Saskatchewan, the 4th., day of November 1946.

(Notarial Seal) CLIFFORD R. MORSE
A Notary Public in and for the Province of Saskatchewan.

My commission expires at death.

(Endorsed) Dated November 4th, 1946. In the Matter of the Citizenship of William Wade Ricketts of Spokane, Washington *County,* United States of America. Statutory Declaration of Irene Margaret Ricketts. C. R. Morse, Barrister, &c., Spiritwood, Sask.

State of Washington,
County of Spokane—ss.

William Wade Ricketts, being first duly sworn, upon [306] oath deposes and says: That he is the plaintiff in the above entitled action. That prior to the trial of this action he made diligent search as to the whereabouts of his wife, Irene Margret Ricketts, from who he separated a number of years last past and whose whereabouts was not within his knowledge. That since the trial of said action, his wife communicated with him and he was able to secure her affidavit attached to the motion herein.

Affiant avers that if granted a new trial or if this action is reopened for the taking of additional testimony, he will be able to supply evidence to the effect that he at all times claimed to be a citizen of the United States, and that at the first time of

his re-entry into the United States following his being taken to Canada by his father, he declared himself to be a citizen of the United States and was admitted for the purpose of making a permanent residence in the United States which he then and there intended to do. That he established a permanent home in this, the country of his birth, which permanent home was interrupted only by the emergency created by an illness of his wife and her insistence upon returning to her home in Canada.

Further affiant saith not.

WM. WADE RICKETTS

Subscribed and Sworn to before me this 13th day of November, 1946.

(Notarial Seal) PATRICIA BREVET
Notary Public in and for the State of Washington, residing in Spokane.

Filed Nov. 13, 1946. A. A. LaFramboise, Clerk

[Title of District Court and Cause.]

STIPULATION

In this case it is stipulated by and between the parties through their respective counsel that there shall be and hereby is incorporated into and made a part of ground 3 of the motion for new trial herein, a paragraph to be designated 3-(b) to read as follows:

> Failure of the Court to apply Title 8, Section 801, sub-division (a), U.S.C.A. and specifically that portion thereof reading as follows:

"That a person who has acquired foreign nationality through the naturalization of his parent or parents, and who at the same time is a citizen of the United States, shall, if abroad and he has not heretofore expatriated himself as an American citizen by his own voluntary act, be permitted within two years from the effective date of this chapter to return to the United States and take up permanent residence therein, and it shall be thereafter deemed that he has elected to be an American citizen."

Dated at Spokane, Washington this 3rd day of December, 1946.

GEO. W. YOUNG,
Attorney for the Plaintiff.

HARVEY ERICKSON,
Attorney for the Defendant.

Filed Dec. 3, 1946. A. A. LaFramboise, Clerk.

[Title of District Court and Cause.]

RULING OF THE COURT ON MOTION FOR NEW TRIAL

The Court: The Court is ready to announce orally its ruling on the motion for new trial in the case of William Wade Ricketts vs. The Attorney General of the United States.

The motion was made on several grounds, and it is the view of the court that a new trial is not warranted on the [308] basis of newly discovered evi-

dence. The familiar rule, of course, is that in order to justify a new trial on that ground, the evidence must have been discovered subsequent to the trial, must be such, the circumstances must be such that it could not with due diligence have been discovered prior to the trial, it must not be merely corroborative or cumulative in character, and of such a nature that in all probability would change the result of the trial. Applying those rules it is the view of the court that a new trial is not warranted on the basis of newly discovered evidence.

The court has given very serious consideration to the question of whether a new trial should be granted on the ground that the evidence does not sustain the judgment of the court, and that there was an error of law in the entry of the findings and judgment.

At the trial of this case the court assumed, erroneously, now, I think, that the 1940 Act which appears in Title 8, Section 801, United States Code Annotated, did not apply to this case, because the removal of the plaintiff from the United States, the naturalization of his father in Canada, his attaining the age of majority, all transpired many, many years prior to the effective date of this Act of 1940, but there is a proviso in here which the court since the making of the motion for new trial has considered, and has considered it in the light of the hearings before the committee on Immigration and Naturalization of the House of Representatives; rather voluminous committee hearings which Mr. Young has submitted for the court's considera-

tion, and they are very, very interesting and very enlightening.

This Act of 1940 provides that a person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by obtaining naturalization in a foreign state, either upon his own application or through the naturalization of a parent having legal custody of such [309] person. Now, the committee hearings show that originally the bill was introduced in that form. It was proposed to provide that under circumstances such as these in the Ricketts case here, if a person born in the United States was taken during minority by his parents to a foreign country, and there his parents became naturalized, or reassumed a foreign nationality, that that child would then lose his American citizenship or nationality.

I might say at this point that in these hearings there were three departments, or four, rather, the Department of Justice, the War Department, to a minor extent, the Department of Labor, and the State Department, were very much interested in this proposed Act, which was to be a recodification or re-enactment of the naturalization laws of the United States. The two departments principally interested were the State Department and the Department of Labor, and much of this voluminous volume of the hearings is taken up, a large part of it, by the controversy between the attorneys for the Labor and State Departments over this very proviso which I think applies to this case.

As I say, originally it was provided that a person

under these circumstances should lose his nationality. That was considered too harsh by everyone, and the Labor and State Departments agreed upon this first proviso without much difficulty, which reads as follows:

> "Provided, however, that nationality shall not be lost as the result of the naturalization of a parent unless and until the child shall have attained the age of twenty-three years without acquiring permanent residence in the United States."

That proviso was put in for the purpose of taking care of cases where a parent took a child born in the United States to a foreign country and the parent then assumed the nationality [310] of the foreign country. It was thought fair to give that child under those circumstances two years after attaining majority, that is, until he was twenty-three years old, to make an election whether to take the nationality assumed by the parents, or retain the American nationality acquired by birth in this country.

Then this controversy developed as to whether anything should be done about the large number of people who had been taken to a foreign country, the parents were naturalized in the foreign country during their minority, and they had been here and had attained ages in excess of twenty three years. The members of the committee and the attorneys for these various departments said "Now, what shall we do about all these people, thousands of them, who have been in a foreign country after

they got to be twenty one years of age, under these circumstances, for four, five, fifteen or twenty years, and it is very interesting to note that there was a marked difference of opinion between the attorneys for the State Department and the Labor Department as to the meaning of the language of Perkins vs. Elg. The Labor Department people took the view that it didn't hold or say that a child losing American nationality or citizenship by foreign naturalization of parents must make an election to return to this country within a reasonable time. They simply said that it meant that under the circumstances that the child did not lose American nationality, and that there wasn't any necessity for Miss Elg to make an election in that case, because she returned promptly to the United States and there was never any question of her having lost her American nationality.

I, however, am inclined to agree that the view which I took of that case in the trial here is the same view taken by the Attorneys for the State Department, and that it is the correct one, that while it might not have been involved, [311] necessarily, in the holding of the case, that all of the reasoning in the case is based upon the fact that there is a dual nationality acquired by a minor whose parents become naturalized in a foreign country; that there is a dual nationality until that minor arrives at the age of majority, and that then the plain implication, I think, of the language of Perkins vs. Elg is that within some reasonable time after attaining the age of majority the minor must

make an election whether to take the foreign nationality of the parents, or return to the United States and retain the American nationality, but be that as it may, the attorneys throughout these hearings, the attorneys for the State Department, strenuously contended that the question of the status of these people who had been in the foreign country for a considerable length of time after majority should be left, not fixed by statute, but left to be determined on each individual case on the basis of the holding of Perkins vs. Elg. The Labor Department, the other hand, said "No, let's open the gate for them. It's true there are a lot of them, but we think in fairness to these people, since there's been so much vacillation over the years, the code changed several times by departmental rulings and Perkins vs. Elg, in fairness to them we should give them a definite time." Some said 1, and some said two years. Finally it was decided upon this second proviso, that all these people should be given two years in which to return to the United States. It reads:

> "Provided further, That a person who has acquired foreign nationality through the naturalization of his parent or parents, and who at the same time is a citizen of the United States, shall, if abroad and he has not heretofore expatriated himself as an American citizen by his own voluntary act, be permitted within two years from the effective date of this chapter to return to the United States and take up permanent residence therein, and it shall [312] be thereafter deemed that he has elected to be an American citizen."

Now, the language of that proviso wasn't originally in that form, and Mr. Florney, who seemed to be the spokesman, counsel for the State Department, said "I don't think you people are doing what you intend to do." He said: "It is my position, the position of the State Department, that a person whose parents took him to a foreign country and became naturalized there during the minority of the child, that that child, if after attaining the age of twenty one lives in the foreign country for a considerable period, that that child thereby makes an election under Perkins vs. Elg." "Now" he said, "in your language you limit this to people who still have the American nationality. It is our position these people all have lost their American nationality, so this language wouldn't apply to them." Then this language was added, deliberately and intentionally, to cover that situation, at the suggestion of the Department of Labor they put in this language that it would apply to everyone living abroad under these circumstances if "he has not heretofore expatriated himself as an American citizen by his own voluntary act" and in the committee hearings it was said that voluntarily meant independent affirmative action, other than the mere residence in the foreign country. That is what that language means, I think, in the plain import of the discussion before the committee, what it was intended to mean.

Mr. Florney said "Why not let's change this, and leave out this "voluntary" and put action, then action would cover mere residence in the foreign

country'' but they rejected his suggestion that the word ''act'' be changed to ''action'' because they didn't want it to cover mere residence, and it wasn't intended to cover mere residence.

Then Mr. Florney submitted this proposed proviso in place of proviso 2. There is considerable discussion here [313] about this proposal he makes, and he says:

> ''Yes sir, I mean taking their proposal, with modifications, retaining that two year provision, but without going so far as to make it necessary to hold that all of these people, regardless of how long they have been living abroad, are citizens. I have that, and I'll be glad to turn it over to the committee. I'll read it, as it is not very long.''
>
> The Chairman: Go ahead.
>
> Mr. Florney: This is the Department of Labor draft, with these variations: Provided, further, that a person who, prior to the effective date of this act, has acquired foreign nationality through the naturalization of his parent or parents, shall, if abroad, and he has not heretofore after attaining the age of twenty one years manifested an ''election of such foreign nationality, be permitted within two years from the effective date of this Act'' etc.

There Mr. Florney tried to deliberately change this proviso so as to make it apply only to people who had not made an election by residence for an unreasonable length of time. The language which he proposed was ''shall, if abroad, and he has not

heretofore after attaining the age of twenty one years manifested an election of such foreign nationality".

In other words, if that proviso were adopted by the committee, then if anyone under these circumstances such as apply to Mr. Ricketts had lived in a foreign country, we'll say five years, then we would say "Well, he's manifested his election by five years residence, and this proviso does not apply to him"; but the committee rejected that proviso, and adopted this one that now appears in the act, which says that this shall allow everyone under these circumstances to [314] come in provided he hasn't expatriated himself by his own voluntary act, which means taking the oath of allegiance of a foreign country or some other similar act.

It has been the view of the court in this case that in the final analysis there was nothing here on which to base expatriation except continued residence in Canada. As the court pointed out, I think, during the first eleven years after Ricketts became twenty one he lived in Canada for all except eleven months, although he didn't come back here until he was about twenty-three. It is true that during minority he served as a school director, before he was twenty one, and I think he voted in a general election, but I think authority is overwhelming that mere voting is not a sufficient act to accomplish expatriation, so that it is my view in this case that this second proviso does apply to Mr. Ricketts. He either came in at the time or was already here; at any rate he was here permanently within this

country within two years after the effective date of this Act; I don't think there can be any question about that.

That's the view the court has come to. I, of course, would not reverse myself giving the matter serious consideration and careful thought, but I agree with someone who said "I will say what I think is right today even though it is inconsistent with everything I said yesterday".

I think a new trial should be granted here. Do you have a copy of the rules of civil procedure? I looked up the provision, and it is very broad, and it enables the court to grant a new trial where the case has been tried before the court, and it really amounts to a reversal. It isn't necessary to have a new setting for trial or to introduce further evidence unless the court wishes to do so. The language here is "A new trial may be granted to all or any [315] of the parties and on all or part of the issues: (1) (Applies to jury trials) (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment."

In this case the court does not consider it necessary to take additional testimony. I think that was pretty fully covered on the trial, and the new trial

being granted here purely on a question of law, it seems to me that all that will be necessary is to set aside the findings and judgment which have been entered, enter new findings of fact and a new judgment adjudging that the plaintiff is a citizen and national of the United States, and entitled to the relief sought.

I might say this, that the court hasn't changed its view of the facts in this case, and I propose to sign findings which show simply the bare facts of his having been born here, having been taken to Canada, the time he returned, and the length of time he has lived here, and then I would of course omit the conclusions as to the effect of that residence in the present findings. I think in one of them there is a findings there that he isn't a resident of this district. I would change that, of course, and find that he is a resident of the district, and then conclude that he is a national of the United States and entitled to the relief sought. I am basing that, of course, upon the second proviso of this Act. It may be that the Circuit Court of Appeals will take the view that under the facts he has expatriated himself regardless of the statute, but that will be in your record and my findings wouldn't change that one way or the other. Do you understand what the court has in mind? [316]

Mr. Young: I understand the court wants simple findings of his birth, and so on, that he was here prior to the adoption of this Act, and then a conclusion that he did not expatriate himself by his

own voluntary acts, and under the provisions of this section he is entitled to prevail.

The Court: Yes.

Mr. Young: I will present that.

The Court: I am not trying to tell you how to try your lawsuit, but I might say if this case goes up it would be very helpful to the Circuit Court of Appeals to have those committee hearings, because it changed my view entirely.

REPORTER'S CERTIFICATE

United States of America,
Eastern District of Washington—ss.

I, Stanley D. Taylor, do hereby certify:

That I am the regularly appointed, qualified and acting Official Court Reporter of the District Court of the United States in and for the Eastern District of Washington.

That as such reporter I reported in shorthand the above entitled cause before the Hon. Sam M. Driver, United States District Judge for the Eastern District of Washington, sitting at Spokane, Washington, on December 20, 1946; that the above and foregoing is a full, true and correct transcript of the stenographic notes taken by me of the proceedings had therein, and that the same contains all objections made and exceptions taken therein.

Dated at Spokane, Washington, this 23rd day of December, 1946.

STANLEY D. TAYLOR,
Official Court Reporter.

Filed Jan. 13, 1947. A. A. LaFramboise, Clerk.

[Title of District Court and Cause.]

ORDER GRANTING MOTION
FOR NEW TRIAL

This matter came regularly on for hearing on plaintiff's motion for a new trial, and the Court, after hearing the arguments of counsel, and being fully advised in the premises, does

Order, Adjudge and Decree that the motion be and the same hereby is granted upon the sole ground of error in law occurring at the trial, the Findings of Fact, Conclusions of Law and Judgment heretofore entered herein are vacated and set aside and the plaintiff is directed to prepare new Findings of Fact and Conclusions of Law and Judgment in conformity with the oral memorandum opinion rendered from the bench at the time of hearing.

Dated this 3rd day of January, 1947.

SAM M. DRIVER,
United States District Judge.

Filed Jan. 3, 1947. A. A. LaFramboise, Clerk.

[Title of District Court and Cause.]

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

This matter coming on before the above entitled Court for hearing on the 30th day of September, 1946, and the plaintiff being represented by Geo. W. Young, his attorney, and the defendant being

represented by Harvey Erickson, United States Attorney for the Eastern District of Washington, and the Court having heard the testimony introduced, the arguments of counsel, and being fully advised in the premises, the Court makes the following

FINDINGS OF FACT

I.

That the action set forth in plaintiff's petition was brought by virtue of the provisions of Title 18, Section 903, [318] U.S.C.A., and other applicable provisions of law relating to declaratory judgments to determine nationality.

II.

That the petitioner was born at Hydro, Oklahoma, on February 3, 1902.

III.

That the father of the petitioner was Siegel Ricketts, who was born in the State of Indiana, and that his mother was Emma Shepard prior to her marriage to his father, and that she was also born in the United States.

IV.

That Siegel Ricketts, the father of the petitioner, was naturalized in the Dominion of Canada on December 31, 1914, and that the petitioner was a minor child residing in Canada with his father at the time of his naturalization, and was on said date 12 years, 10 months and 29 days of age.

V.

That on February 2, 1923, the petitioner became twenty one years of age and then lived in the Dominion of Canada. That the petitioner returned to the United States about November of 1926. That he remained in the United States for a period of approximately six months, then returned to the Dominion of Canada where he resided until 1936 when he again entered the United States. That since 1936, the plaintiff has remained constantly therein, engaged in business, participated in civic affairs, registered as a voter, and voted in elections in the United States.

VI.

That the petitioner did not by his own voluntary act expatriate himself, but to the contrary has continuously asserted his claim of United States citizenship.

Dated this 3rd day of January, 1947.

SAM M. DRIVER,
United States District Judge.

Presented by:

GEO. W. YOUNG,
Attorney for Plaintiff.

From the foregoing Findings of Fact, the Court makes the following

CONCLUSIONS OF LAW

I.

That the petitioner is entitled to the benefit of the proviso contained in Title 8, Section 801-A, U.S.C.A.

II.

That the petitioner was and now is a citizen of the United States, entitled to all of the benefits and privileges appertaining thereto.

Dated at Spokane Washington this 3rd day of January, 1947.

SAM M. DRIVER,
United States District Judge.

Presented by:

GEO. W. YOUNG,
Attorney for the Plaintiff.

Approved as to form

HARVEY ERICKSON
U. S. Atty.

Copy Received this 27th day of December, 1946.

HARVEY ERICKSON,
Attorney for Defendant.

Filed Jan. 3, 1947. A. A. LaFramboise, Clerk.

[Title of District Court and Cause.]

JUDGMENT

This matter coming on for hearing before the above entitled Court on the 30th day of September, 1946, the [320] plaintiff being represented by Geo. W. Young, his attorney, and the defendant being represented by Harvey Erickson, United States Attorney, and the Court having heard the testimony introduced, argument of counsel, and having ren-

dered his oral opinion on the motion for new trial herein, and made his Findings of Fact and Conclusions of Law, and being fully advised in the premises, does

Order, Adjudge and Decree that the petition of the plaintiff be and the same hereby is granted, and does further

Order, Adjudge and Decree that the plaintiff was and he hereby is adjudged to be a citizen of the United States entitled to all of the benefits and privileges appertaining thereto.

Dated this 3rd day of January, 1947.

SAM M. DRIVER,
United States District Judge.

Presented by:

GEO. W. YOUNG,
Attorney for the Plaintiff.

Approved as to form

HARVEY ERICKSON
U. S. Attorney

Copy Received this 27th day of December, 1946.

HARVEY ERICKSON,
Attorney for Defendant.

Filed Jan. 3, 1947. A. A. LaFramboise, Clerk.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that the Attorney General of the United States, defendant above named, does hereby appeal to the Circuit Court of Appeals

for the Ninth Circuit from the final Judgment entered in this action on the 3rd day of January, 1947.

Dated this 19th day of March, 1947.

HARVEY ERICKSON,
United States Attorney.
FRANK R. FREEMAN,
Assistant United States Attorney,

Copy received this 19th day of March, 1947.

GEO. W. YOUNG,
Attorney for Plaintiff-Appellee.

Copy of Notice of Appeal forwarded George W. Young, Attorney for Plaintiff-Appellee this 19th day of March, 1947.

A. A. LaFRAMBOISE,
Clerk.
EVA M. HARDIN,
Deputy Clerk.

Filed March 19, 1947. A. A. LaFramboise, Clerk.

[Title of District Court and Cause.]

STATEMENT OF POINTS RELIED UPON ON APPEAL

The appellant states that in its appeal to the Circuit Court of Appeals for the Ninth Circuit from

the judgment entered in the above entitled case against the defendant, the appellant, on the 3rd day of January, 1947, adjudging that the plaintiff is a citizen of the United States and entitled to all the benefits and privileges appertaining thereto, appellant intends to rely upon the following points:

First: That the Court erred in making Finding of Fact No. 5, which was as follows:

> "That on February 2, 1923, the petitioner became twenty one years of age and then lived in the Dominion of Canada. That the petitioner returned to the United States about November of 1926. That he remained in the United States for a period of approximately six months, then returned to the Dominion of Canada where he resided [322] until 1936 when he again entered the United States. That since 1936, the plaintiff has remained constantly therein, engaged in business, participated in civil affairs, registered as a voter, and voted in elections in the United States."

Second: That the Court erred in making Finding of Fact No. 6, which was as follows:

> "That the petitioner did not by his own voluntary act expatriate himself, but to the contrary has continuously asserted his claim of United States citizenship."

Third: That the Court erred in making Conclusion of Law No. 1, which was as follows:

> "That the petitioner is entitled to the benefit

of the proviso contained in Title 8, Section 801-A, U.S.C.A."

Fourth: That the Court erred in making Conclusion of Law No. 2, which was as follows:

"That the petitioner was and now is a citizen of the United States, entitled to all of the benefits and privileges appertaining thereto."

Fifth: That the Court erred in making its Judgment, ordering and decreeing that the plaintiff is adjudged to be a citizen of the United States, entitled to all benefits and privileges appertaining thereto.

Dated this 19th day of March, 1947.

HARVEY ERICKSON,
United States Attorney.
FRANK R. FREEMAN,
Assistant United States Attorney.
Attorneys for Appellant.

Copy received this 19th day of March, 1947.

GEO. W. YOUNG,
Attorney for Plaintiff-Appellee.

[Endorsed]: Filed Mar. 19, 1947.

[Title of District Court and Cause.]

DESIGNATION OF PORTION OF RECORD TO CONSTITUTE RECORD ON APPEAL

Comes now the defendant appellant, the Attorney General of the United States, and hereby designates the portion of the record to be transmitted to the United States Circuit Court of Appeals for the Ninth Circuit and to constitute the record in the above entitled case, to-wit:

1. Petition for Declaratory Judgment.
2. Answer.
3. Opinion of the Court dated October 3, 1946.
4. All exhibits.
5. Findings of Fact and Conclusions of Law dated November 5, 1946.
6. Judgment dated November 5, 1946.
7. Motion for New Trial.
8. Stipulation.
9. Order Granting Motion for New Trial.
10. Ruling of the Court on Motion for New Trial.
11. Findings of Fact and Conclusions of Law dated January 3, 1947.
12. Judgment dated January 3, 1947.

HARVEY ERICKSON
FRANK R. FREEMAN
Attorneys for Defendant-Appellant.

Appellant, The Attorney General of the United States, 334 Federal Building, Spokane, Washington.

Copy received this 19th day of March, 1947.

GEO. W. YOUNG,
Attorney for Plaintiff-
Appellee.

Filed Mar. 19, 1947. A. A. LaFramboise, Clerk.

[Title of District Court and Cause.]

SUPPLEMENTAL DESIGNATION OF PORTIONS OF RECORD TO CONSTITUTE RECORD ON APPEAL

Comes now the defendant appellant, the Attorney General of the United States, and hereby designates additional portions of the records previously designated to be transmitted to the United States Circuit Court of Appeals for the Ninth Circuit and to constitute the record on appeal in the above entitled case, to-wit:

1. Transcript of testimony.
2. Notice of Appeal.
3. Designation of Record on Appeal filed March 19, 1947 and Supplemental Record filed April 9, 1947.
4. Statement of Points to be Relied Upon on Appeal.

HARVEY ERICKSON
United States Attorney.
FRANK R. FREEMAN,
Assistant United States Attorney,
Attorneys for Appellant.

Copy received this 9 day of April, 1947.

GEO. W. YOUNG,
Attorney for Plaintiff-
Appellee.

Filed April 14, 1947. A. A. LaFramboise, Clerk.

CLERK'S CERTIFICATE TO TRANSCRIPT OF RECORD

United States of America,
Eastern District of Washington—ss.

I, A. A. LaFramboise, Clerk of the District Court of the United States for the Eastern District of Washington, do hereby certify the foregoing typewritten pages numbered from 1 to 325 inclusive, to be a full, true, correct and complete copy of so much of the record, papers and all other proceedings in the above entitled cause, as are necessary to the hearing of the appeal therein, in the United States Circuit Court of Appeals, as called for by the appellant in his Designation of Portion of Record to Constitute Record on Appeal and Supplemental Designation of Portion of Record to Constitute Record on Appeal, as the same remains of record and on file in the office of the Clerk of said District Court, and that the same constitutes the record on appeal from the Judgment of the District Court of the United States for the Eastern District of Washington dated January 3, 1947, to

the Circuit Court of Appeals for the Ninth Judicial Circuit, San Francisco, California.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at Spokane in said District this 21st day of April, A. D. 1947.

[Seal] /s/ A. A. LaFRAMBOISE,
Clerk, U. S. District Court, Eastern District of Washington. [326]

[Endorsed]: No. 11594. United States Circuit Court of Appeals for the Ninth Circuit. The Attorney General of the United States, Appellant, vs. William Wade Ricketts, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Eastern District of Washington, Northern Division.

Filed April 23, 1947.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the Circuit Court of Appeals of the United States in and for the Ninth Circuit

No. 11594

WILLIAM WADE RICKETTS,
Plaintiff Appellee,

vs.

THE ATTORNEY GENERAL OF THE UNITED STATES,
Defendant Appellant.

THE DESIGNATION OF PORTION OF RECORD FOR PRINTING

The appellant desires to have the entire record printed as certified by the trial court.

Dated this 9th day of April, 1947.

/s/ HARVEY ERICKSON,
United States Attorney

/s/ FRANK R. FREEMAN,
Assistant United States Attorney
Attorneys for Appellant.

Copy received this 9 day of April, 1947.

/s/ GEO. W. YOUNG,
Attorney for Plaintiff Appellee.

[Endorsed]: Filed April 23, 1947.

[Title of Circuit Court of Appeals and Cause.]

THE CONCISE STATEMENT OF POINTS RELIED UPON ON APPEAL

Comes now the defendant appellant, the Attorney General of the United States, and hereby gives notice that he desires to adopt in the United States Circuit Court of Appeals the Statement of Points Relied Upon On Appeal filed in the United States District Court for the Eastern District of Washington, as a concise statement of points upon which he intends to rely in this appeal in this Court.

Dated this 9th day of April, 1947.

/s/ HARVEY ERICKSON,
United States Attorney
/s/ FRANK R. FREEMAN,
Assistant United States Attorney
Attorneys for Appellant

Copy received this 9 day of April, 1947.

/s/ GEO. W. YOUNG,
Attorney for Plaintiff Appellee.

[Endorsed]: Filed Apr. 23, 1947.

NO. 11594

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THE ATTORNEY GENERAL OF THE UNITED STATES, *Appellant*,

vs.

WILLIAM WADE RICKETTS, *Appellee.*

On Appeal From the District Court of the United States for the Eastern District of Washington Northern Division

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BRIEF FOR THE UNITED STATES

HARVEY ERICKSON,
United States Attorney

FRANK R. FREEMAN,
Assistant United States Attorney,

Spokane, Washington
Attorneys for Appellant.

GREEN-HUGHES PTG CO., SPOKANE

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CITATIONS

NO. 11594

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THE ATTORNEY GENERAL OF THE UNITED STATES, *Appellant*,

vs.

WILLIAM WADE RICKETTS, *Appellee*.

OPINION BELOW

The two memorandum opinions of the District Court (R. 227-240 and R. 345-356) are not reported.

JURISDICTION

This action was instituted under the provisions of Title 8, Sec. 903, U. S. C. A., being that section of the Nationality Act which permits any person who claims a right or privilege as a National of the United States and who is denied any right or privilege by any department or agency of the United States on the ground that he is not a National of the United States to bring an action against the department or agency who refuses him that right, either in the District Court of the District of Columbia or in the District Court in

which the aggrieved person claims residence. This action was instituted by the appellee as plaintiff claiming that he was a citizen of the United States and that the Immigration and Naturalization Service of the Department of Justice was seeking to deprive him of that right by insisting that he was not an American citizen but a British subject and unlawfully in the United States and subject to deportation.

The action was correctly brought by the appellee as plaintiff in the District Court for the Eastern District of Washington, which was the District in which the appellee claimed to be a resident, against the Attorney General of the United States, who is head of the Immigration and Naturalization Service of the Department of Justice. (R. 2-4).

QUESTIONS PRESENTED

1. Whether the Court was justified from the evidence in this case in making Finding of Fact No. 5 (R. 359) which is as follows:

> "That on February 2, 1923, the petitioner became twenty-one years of age and then lived in the Dominion of Canada. That the petitioner returned to the United States about November of 1926. That he remained in the United States for a period of approximately six months, then returned to the Dominion of Canada where he resided until 1936 when he again entered the United States. That since 1936, the plaintiff has remained constantly therein, engaged in business, participated in civic affairs, registered as a voter, and voted in elections in the United States."

2. Whether the Court was justified from the evidence in this case in making Finding of Fact No. 6 (R. 359) which is as follows:

> "That the petitioner did not by his own voluntary act expatriate himself, but to the contrary has continuously asserted his claim of United States citizenship."

3. Whether the Court was justified from the evidence in the case in making Conclusion of Law No. 1 (R. 359) which is as follows:

> "That the petitioner is entitled to the benefit of the proviso contained in Title 8, Section 801-A, U.S.C.A."

4. Whether or not the Court erred in holding as a matter of law that the petitioner was a citizen of the United States.

STATUTES INVOLVED

The statutes involved in this case are set forth in the Appendix.

STATEMENT

The facts in this case as disclosed from the evidence and as found by the Court are briefly as follows:

That the petitioner, William Wade Ricketts, was born in the town of Hydro, Oklahoma on February 3, 1902. (R. 313). He was the son of Siegel Ricketts who was an American citizen born in the State of Iowa (R. 10). His mother likewise was an American citizen. She was born in Barnville, Illinois (R. 287).

Petitioner's parents were residents of the State of Oklahoma and native born American citizens at the time petitioner was born. Petitioner was taken to Canada by his parents in the month of July, 1910, when he was about eight years of age. His parents were attracted to Canada by the land that was open for homesteading. The certificate of naturalization of petitioner's father, Siegel Ricketts, is set forth in defendant's Exhibit II (R. 169-171) and shows that Siegel Ricketts became a British subject December 31, 1914. Petitioner's mother also became a British subject by virtue of her husband's naturalization and residence on a homestead in Canada.

The petitioner remained in Canada until he was twenty-four years and four months of age, or until June 12, 1926, Defendant's Exhibit 2 (R. 219, 222, 247, 342) when he entered for the first time. Before coming to the United States in 1926, the petitioner, after reaching his twenty-first birthday, contracted a common law marriage in Canada on February 28, 1923 (R. 221-223). Two children were born in Canada. When the petitioner came to the United States the second time in the fall of 1926, he brought his common law wife and oldest child. When he went back to Canada in the spring of 1927 (R. 222) he took his wife and child back with him and they have never since returned to the United States. The children are still minors and still reside in Canada (R. 223). Ricketts was admitted as a visitor on both occasions when he entered the United States in 1926 Defendant's Exhibit 2 (R. 243-264), Defendant's Exhibit 3 (R. 230), Defendant's Exhibit 6 (R. 234).

His next entry into the United States following his departure at the termination of his second visit, in the spring of 1927, was approximately ten years later on September 6, 1936, Defendant's Exhibit 3, (R. 230) at which time he entered as a temporary visitor. His next entry was on June 14, 1937, Defendant's Exhibit 6 (R. 234), also as a temporary visitor. He again entered the United States on November 3, 1937 without an immigration visa or document entitling him to do so by walking across the international border and not reporting at a United States Immigration office for inspection (R. 192 and 229), Defendant's Exhibit 2, Question 11 (R. 247). Defendant's Exhibit 2 was subscribed and sworn by the petitioner before James E. Sullivan, U. S. Immigrant Inspector, on August 2, 1943 (R. 264). There seems to be some confusion as the petitioner stated at the hearing (R. 11) that he first returned to the United States in 1925, and returned to Canada after approximately six months, or in April, 1926 (R. 12); that he again came to the United States the following fall and returned to Canada five months later or in the spring of 1927 (R. 13), both times at Eastport, Idaho. The Immigration and Naturalization Service has no written record of these entries into the United States, but the fact remains that between 1926 and 1942, the petitioner did not at any time make any claim that he had entered the United States with the intention of residing permanently. His first such claim was advanced on April 1, 1942. Defendant's Exhibit 15 (R. 291). In his relations with the United States Immigration and Naturalization Service, the

petitioner filled out numerous forms and was also given numerous hearings before he instituted this action, in all of which he claimed to be a British subject or a Canadian citizen. Defendant's Exhibit 2 (R. 244), Defendant's Exhibit 3 (R. 230), Defendant's Exhibit 5 (R. 322), Defendant's Exhibit 6 (R. 234), Defendant's Exhibit 7 (R. 235), Defendant's Exhibit 8 (R. 69), Defendant's Exhibit 12 (R. 183), Defendant's Exhibit 14 (R. 267), Defendant's Exhibit 17 (R. 314).

The petitioner admitted that in Canada he had the full rights and privileges of a Canadian citizen; that he held public office in Canada as a school trustee and Counsellor of the Municipality of Round Hill, Saskatchewan, which was an elective position and is the same as a County Commissioner of a County in the United States, and that he had to be a citizen of Canada to hold that position; that he served in that capacity after he had reached his eighteenth birthday. He also stated that he had to be a citizen of Canada in order to be a school trustee (R. 315-316) and at the time he considered himself to be a citizen of Canada and had no intention of ever returning to the United States. Petitioner stated that he voted in school and municipal elections several times (R. 317); that he voted in the Provincial election in 1927 when he was twenty-five years of age; that he attempted to vote in the Dominion election in 1930 when he was twenty-eight years of age but they refused to permit him to vote because he was out of his home constituency (R. 317).

When returning to the United States in September, 1936, the petitioner was admitted as a Canadian citizen and as a visitor for two weeks. Defendant's Exhibit 3 (R. 230). He stayed three months and then obtained an extension. Defendant's Exhibit 5 (R. 232). The petitioner was again admitted on June 14, 1937, Defendant's Exhibit 6 (R. 234), for a temporary visit of two months. He later returned to Canada to see the American Consul at Vancouver, B. C., about securing a visa to enter the United States as a permanent resident (R. 194 and R. 274). He was later excluded from admission to the United States, Defendant's Exhibit 12 (R. 184), but entered unlawfully on November 6, 1937 (R. 325) and was subsequently apprehended and deported by United States Immigration Officials from the United States on June 17, 1938 (R. 328). After being deported he again entered the United States by evading inspection at Babb, Montana, in December, 1939 (R. 326). He was again apprehended by Immigration officials and deportation proceedings were instituted, Defendant's Exhibit 17 (R. 211). He was offered an opportunity to depart voluntarily in lieu of deportation (R. 16-17) and did depart in May or June, 1944 (R. 17). He was unable to obtain an immigration visa and thereafter returned to the United States about the first of October, 1944 (R. 150).

Ricketts, since 1944, has taken the position that he is entitled to remain in the United States and is a citizen of the United States. The petitioner registered under the requirements of the Selective Service and Training Act at Spokane, Washington, and returned

a questionnaire dated May 14, 1942 stating that he was not a citizen of the United States and was last a citizen or subject of Canada (R. 32). Ricketts was later apprehended by the Immigration authorities in January, 1943 and at their suggestion made a trip into Canada for the purpose of securing credentials to enter the United States (R. 16-17). At that time he applied for and obtained a British passport as a Canadian citizen. The passport is set forth as Defendant's Exhibit 10 (R. 165).

At the trial the petitioner produced witnesses to the effect that during the time he resided in Canada, before 1936, that he had maintained to these witnesses in private conversations that he was an American citizen and not a British subject. The testimony of these witnesses is as follows:

Forrest Dale Campbell (R. 141)
Albert W. Cull (R. 85)
John Blair Lowrie (R. 127)
John Gardner McDougall (R. 111)

In addition several witnesses were furnished by the petitioner at the trial to testify that since his residence in the State of Washington he claimed to be an American citizen:

George Forbes (R. 215)
Harold Gubser (R. 102)
Ernest McCall (R. 76)

The Court, after having heard the testimony, returned an oral opinion (R. 227) holding that Ricketts was not an American citizen because of the fact that

after his twenty-first birthday he did not make an election to retain his American citizenship but instead, although only a few miles away from the United States, remained in Canada for a period of years. The court stated as follows (R. 239):

> "Under those circumstances we can't say he did establish premanent residence or assume the duties of citizenship, prior to 1936, which was too long, it seems to me, for him to make an election."

After he returned to Canada in 1926 he voted in the general election there. He never voted in a general election in the United States (R. 207 and 318).

A motion for new trial was made by the plaintiff (R. 339). Arguments were had upon the motion and the Court, on December 23, 1946, rendered a second oral opinion in which he reversed his former oral opinion of October 2, 1946. The second oral opinion of the Court was based upon the fact that the petitioner had until two years after the effective date of the statute, or until two years after the Nationality Act of 1940 went into operation, or until January 13, 1943, in order to make his election as to whether or not he should become an American citizen. The Court now took the position that Ricketts had made his election to claim American citizenship before 1943 and was therefore an American citizen and not subject to deportation.

STATEMENT OF POINTS TO BE URGED

1. The appellee failed to return to the United States within a reasonable time after his twenty-first birthday and therefore forfeited his claim to American citizenship.

2. The appellee elected to exercise the duties of a Canadian citizen or British subject prior to his entry into the United States for permanent residence and by virtue of the provisions of law relative to expatriation as set down in the case of *Perkins* v. *Elg*, 307 U. S. 325, lost his nationality as an American citizen.

SUMMARY OF ARGUMENT

The petitioner made an election after attaining his majority to become a British subject. The whole life of the petitioner until 1936, when he was nearly thirty-five years of age, was centered in Canada where he voted, held political office, married, raised his family and earned his livelihood. His claim to American citizenship is not definitely asserted until 1944 when he was forty-two years of age.

The Nationality Act of 1940, Title 8, Sec. 801 U.S.C.A., did not contemplate that a person who had already given up his citizenship or expatriated himself by his own voluntary act and deed could later claim American citizenship. The record in this case is abundant with evidence to the effect that the petitioner did choose to become a British subject by his own voluntary acts. These consist, in addition to holding public office and voting in Alberta and Sas-

katchewan, of marrying a Canadian woman and raising children in Canada and leaving them there when coming to the United States. It certainly can be presumed that petitioner did not intend to leave his minor children in a foreign land while claiming himself to be an American citizen. In addition to this, he worked and maintained his family in Canada for years, and never once contended that they were American citizens. In view of all these circumstances the petitioner expatriated himself beyond any doubt.

ARGUMENT

As has been pointed out, the evidence in this case was that the petitioner, William Wade Ricketts, was born in Hydro, Oklahoma, on February 2, 1902 of American parents. The parents emigrated to Canada, his father becoming a British subject in order to obtain title to a Canadian homestead on December 31, 1914. By virtue of this citizenship his mother also became a British subject. At the time the father obtained Canadian citizenship as a British subject, the petitioner was almost thirteen years of age. He continued to live in Canada with his folks during minority and didn't return to the United States until years later. He held the offices of school trustee and Counsellor of the Municipality of Round Hill, Saskatchewan (R. 315) which were elective positions. He stated that he had passed his eighteenth birthday at the time and that he had to be a citizen of Canada to hold these positions (R. 316). He also stated that he had no intention at that time of ever returning to the

United States to reside. He stated that he intended when he became of age to remain in Canada indefinitely and assume the rights and privileges of a Canadian citizen (R. 317). He stated that he had voted in school and municipal elections several times (R. 317). He stated that he only voted once in the general election in Canada and in 1930 he tried to vote in the Dominion election but the authorities refused to let him vote because he was out of his home constituency at the time of the election. It should be remembered that the petitioner was then twenty-eight years of age and when he voted in the Provincial election in 1927, he was twenty-five years of age. It is apparent from these actions that the petitioner exercised full duties and full responsibilities as a Canadian citizen, at least up to and including 1930.

Petitioner's visits to the United States are set forth in a form executed by him as Defendant's Exhibit 2 (R. 242). In that form, which was filled out on August 2, 1943, the petitioner states that he was a British subject (R. 244) and that he first entered the United States on June 12, 1926 as a visitor from Canada. He next entered the United States on December 15, 1926 as a visitor. The first visit to the United States comprised about six weeks, the second visit to the United States began December 15, 1926 and comprised a period of about three and one-half months. He did not enter the United States again until September 10, 1936 when he stated that he entered the United States as a visitor. He was then thirty-four years of age. He stayed until June 1,

1937. He next entered the United States on June 17, 1937 as a visitor and stayed until he voluntarily left on October 27, 1937. The petitioner states that his next visit to the United States was December 6, 1939. In none of these entries or the hearings based thereon or in the questionnaires executed by the petitioner did he claim to be anything but a British subject and a resident of Canada.

It should also be remembered that on February 28, 1923, the petitioner contracted a common law marriage in Canada. Two children were born as the issue of this marriage. The oldest child and wife accompanied him to the United States in 1926 on his second visit. They returned to Canada and never came back to the United States (R. 221-223). The children are still minors and still remain in Canada. Petitioner later obtained a common law divorce from his wife but the children, who are residents of Canada and citizens thereof, are still being supported by him (R. 223).

The petitioner became twenty-one years of age on February 2, 1923. For a period of thirteen years after becoming of age he spent about four and one-half months in the United States, during which time he stated that he was a visitor and a British subject residing in Canada. Canada is very close to the United States so it would be very easy for him to come to the United States if he so desired for permanent residence because of his proximity thereto. Instead of coming to the United States, he proceeded to contract a common law marriage in Canada to a

British subject. Children were born as the issue of this marriage who reside in Canada. He made no effort to take his common law wife and children to the United States but instead lived there and took part in political affairs in Canada and voted several times in the school and municipal elections and once in the Provincial election and attempted to vote in the Dominion election in 1930 when twenty-eight years of age (R. 316-318). The petitioner proceeded to cast his vote in the 1927 Provincial election after having been admitted twice to the United States in June, 1926 and December, 1926. His wife at that time suffered ill health in Spokane and in the spring asked Ricketts to take her back to Canada, which he did. Although he states that he intended to remain permanently in the United States at that time, immediately the next year he continued his duties as a Canadian citizen and British subject by voting in the election there and continuing to vote or attempting to vote until at least the Dominion election in 1930. These actions on his part were wholly inconsistent with his present contention that he is an American citizen and that he intended to remain premanently in the United States in the spring of 1927. The testimony of the various exhibits in the case is to the effect that Ricketts stated that he had no intention of staying in the United States in 1926 and 1927 but was merely here as a visitor to see how things were on this side of the line.

Title 8, Sec. 801, U.S.C.A. provides that:

> "A person who is a National of the United States whether by birth or naturalization, shall

> lose his nationality by * * * That nationality shall not be lost as the result of the naturalization of a parent unless and until the child shall have attained the age of twenty-three years without acquiring permanent residence in the United States: Provided further, That a person who has acquired foreign nationality through the naturalization of his parent or parents, shall, if abroad and he has not heretofore expatriated himself as an American citizen by his own voluntary act, be permitted within two years from the effective date hereof to return to the United States. * * *

It is the contention of the appellant in this case that Ricketts did expatriate himself by his own voluntary act. It is conceded that residence alone for a period of thirteen years would only be a circumstance showing that he had elected to be a British subject but in addition to this is his long period of residence after his twenty-first birthday. We have in addition to that fact the voting record of petitioner. It should be apparent that Ricketts at the time he voted must have considered himself to be a British subject or he would not have exercised the franchise in Canada on several occasions dating up to his twenty-eighth birthday at least. In addition to that fact the petitioner proceeded to take a part in Canadian politics and governmental affairs by holding office as a school trustee and as a Counsellor of the town of Round Hill, Saskatchewan. He states that he was over eighteen years of age when he held these positions and that the laws of Canada permitted him to hold these public offices when he was over eighteen (R. 316).

It is a matter of common knowledge that before a person can hold any public office he must take some oath of allegiance to maintain and support the laws of the country under which he is holding office the same as a person holding a school or municipal office in the United States must take an oath that he will support the Constitution of the United States and the State of which he is a resident. Certainly Ricketts had to do this in Canada in order to qualify for the positions to which he was elected although the record does not indicate that this took place after his twenty-first birthday. The fact does remain that the record disclosed that immediately prior to his twenty-first birthday he considered himself to be a British subject to the full extent that he was willing to hold office in Canada. This is entirely inconsistent with his later statements arrived at and made by him in later years to other persons that he considered himself to be an American citizen.

In looking at this case realistically, if Ricketts did sincerely believe that he was an American citizen he would not have entered Canadian politics and not have held any political office of any character in Canada. He would have attempted to establish residence across the border in the United States and vote there.

In his final judgment, setting aside the findings and judgment previously entered in this case, it was made clear by Judge Driver that the reversal of his position was due principally to what he considered his previous erroneous assumption that the Nation-

ality Act of 1940 did not apply to this case (R. 346). He indicated that his study of the Report of Hearings before the House Committee of Immigration and Naturalization on the bill which finally became the Nationality Act of 1940 had convinced him that the provisions of that Act, particularly the second proviso to Section 401(a) (Section 801(a) U.S.C.A. were applicable here. This, he stated, is because this proviso

> "Shall allow everyone, under these circumstances, to come in provided he hasn't expatriated himself by his own voluntary act, means taking the oath of allegiance to a foreign country or some other similar act." (R. 353).

The Court also stated:

> "There is nothing here on which to base expatriation except continued residence in Canada."

Careful study of the testimony, debate and statements in the report of the Committee Hearings concerning Section 401(a), and particularly the second proviso to that section, indicates that the Court erred in these statements. It also makes clear the following facts:

(1) That the language of the second proviso to Section 401(a) of the Nationality Act of 1940 is that proposed by the representatives of the Department of Labor of which department the Immigration and Naturalization Service was then a part.

(2) That the Department of Labor did not intend this proviso to permit the return within two years

of *all* persons who had acquired a foreign nationality through the naturalization of a parent, but only those who had not prior to the date of the Act expatriated themselves as American citizens by (1) the operation of the treaty, (2) by statute, or (3) by a voluntary act.

(3) That in assuming the position that expatriation might occur from a voluntary act on the part of such persons, other than one covered by treaty or statute, the Department of Labor relied upon the then recent opinion of the U. S. Supreme Court in the case of *Perkins* v. *Elg*.

> "To cause a loss of that citizenship *in the absence of treaty or statute having that effect, there must be voluntary action* and such action can not be attributed to an infant whose removal to another country is beyond his control and who during minority is incapable of a binding choice." (*Perkins* v. *Elg*, page 333) (Italics supplied).

(4) That the Department of Labor did not then consider that the fact of foreign residence alone was sufficient to cause expatriation.

(5) That with respect to the status of persons under the second proviso of Section 401(a) who had acquired a foreign nationality and allegiance through the naturalization of a parent, the position of the Department of Labor was clearly indicated at the Committee Hearings by the statements of one of its principal representatives, Mr. Thomas B. Shoemaker, then and still Deputy Commissioner of Immigration and Naturalization, as follows:

> "Our position so far as the clause which has been included in the code is concerned is that in these cases where the individual has not voluntarily by his own act expatriated himself, *and there is a doubt as to whether he has adhered to the foreign allegiance to the exclusion of the American allegiance*, he should be given the opportunity to return to the United States within a period of two years, and then if he failed to do so, he is forever estopped from claiming American citizenship, either through the act of birth or whatever his claim must be based upon." (Italics supplied.)

There can be no "doubt" here that the plaintiff adhered to a foreign allegiance in view of his voting, holding public office and asserting his Canadian citizenship over a period of many years.

Mr. Shoemaker, on pages 254 and 255 of the Report of Committee Hearings, stated:

> "We do believe, on the other hand, that if there is to be any amendment that a child or any person who has *in good faith believed themselves to be American citizens and represented and acted under that impression abroad*, should be given an opportunity within two years to return to the United States, and if they do not return within the period of two years of the date of approval of this amendment, they will then forever be estopped by such failure from thereafter claiming such American citizenship by virtue of the claims which they then had." (Italics supplied.)

Again on page 255, Mr. Shoemaker stated:

> "Why question the status of the individual who, for instance, has been away and *always acted as a citizen and thought he was a citizen and has* been stopped from coming back because

> the Department of Labor abided by that ruling (Ref. to Tobiassen Ruling). We say if those people have not done anything to expatriate themselves that then they as individuals should be given a period of time to return, if they prefer to do so, and a reasonable period of time should be granted for them within which to return." (Italics supplied.)

Plaintiff by his own admission, over a period of many years did not believe himself to be an American citizen and certainly did not represent himself so to be or act as one when he ran for public office and voted in Canada.

Mr. Shoemaker on page 256 of the Report of Committee Hearings stated:

> "Since the fourteenth amendment to the Constitution was enacted in 1868, a person born in the United States to be a citizen of the United States by virtue of that amendment; therefore, the individual to whom I refer who has not expatriated himself *by a voluntary act*, would continue to be an American citizen. The Supreme Court in the Elg case referred to three methods of expatriation; namely, *by statute, by treaty and by voluntary action.* The mere remaining abroad is not characterized definitely as a loss of citizenship but if that individual to whom you refer comes back to the United States and does not return to the foreign country as a citizen of the United States, but if on the contrary he has taken naturalization and has been expatriated, he will not be admitted. On the contrary, if he has not committed any voluntary act, he will be." (Italics supplied.)

As previously stated, the amendment to Section 401(a) of the Nationality Act (second proviso) was suggested by, and is in the language of, representa-

tives of the Department of Labor. In finally adopting that amendment the Committee made it clear that it was not intended to open the gate to everyone, and, too, that any person contemplated in Section 401(a) would be required to satisfy consular and/or immigration officers that he had not lost his United States citizenship.

Report of Committee Hearing, page 318:

> "The Chairman. That is along the line suggested by the Department of Labor. Am I correct in making that statement?
>
> Mr. Rees. Yes, sir; that is right.
>
> Mr. Mason. During that 2 years and 90 days they are left in status quo you do not know whether they are or not citizens?
>
> Mr. Rees. Yes, sir; that is correct.
>
> Mr. Lesinski. In other words, they have to prove to the United States that they are citizens and that they have not done anything to take citizenship away from them?
>
> Mr. Rees. Just as they are now.
>
> Mr. Lesinski. This would be the group that has been away 30 or 40 years?
>
> Mr. Rees. That is the group we are talking about."

Report of Committee Hearing, page 321:

> "The Chairman. Yes, but we are saying you have gone too far, and we want to stop you. We do not make him a citizen, and the burden is upon him to show he is a citizen.
>
> Mr. Van Zandt. If we use the words "who claims to be a citizen," that would cover it—

Mr. Curtis. Then you open the gate to anybody.

The Chairman. Using the words "who is a citizen" puts the burden on him.

Mr. Mason. I move the adoption of this amendment, Mr. Chairman.

Mr. Lesinski. The motion is made that this amendment to section 401(a) be accepted as read.

(The motion was carried.)"

From the foregoing and from the report of the Committee Hearings as a whole, it will be seen that the representatives of the Department of Labor were seeking to provide for the admission as a United States citizen within two years from the date of the Act of any person who had acquired a dual nationality and consequently a foreign allegiance through the naturalization of a parent provided he had done nothing himself that would have caused his expatriation. They indicated that the principles stated by the Supreme Court in the Elg case, which was then the law of the land, would be followed in determining whether any such person "has not heretofore expatriated himself as an American citizen by his own voluntary act." If such expatriation had not occurred on the date the Act became effective, then its provisions would operate to protect him for a period of two years unless, after January 13, 1941, he did one or more of the things specified in the other subsections of Section 401(a) as acts of expatriation; otherwise, the provisions of this act would not apply. Here we contend that plaintiff expatriated himself by volun-

tary acts, voting, holding public office and holding himself out as a citizen of Canada and consequently that the provisions of Section 401(a) are not applicable.

In determining the citizenship under the principles laid down in the Elg case, the representatives of the Department of Labor did not propose to hold that foreign residence alone be considered a voluntary act sufficient to cause expatriation, and in this respect they differed with representatives of the Department of State. The representatives of the Department of State opposed adoption to the second proviso of section 401(a) and argued for legislation that would have required indefinite application of the principles of the Elg case in determining citizenship in this class of cases. The interpretation placed upon the Elg opinion by the representatives of the Department of State was different from that of the representatives of the Department of Labor in that the State Department held that continued foreign residence after attaining majority was a voluntary act sufficient to cause expatriation. The Department of Labor, however, took the position that regardless of the length of foreign residence if the person had always in good faith believed himself to be an American citizen, he should not be considered to have become expatriated at least until given an opportunity to return and claim his United States citizenship. It seems clear that any of these persons, who in addition to living abroad, exercised the right of franchise, ran for and were elected to public offices, and in their dealings with officers of the foreign country and of the United

States claimed the foreign nationality to the exclusion to that of the United States could not qualify for admission to the United States under this provision.

The case of *Schaufus* v. *Attorney General of the United States*, 45 Fed. Supp. 61, is somewhat analogous to the situation existing in this case. In the Schaufus case the petitioner was born of American parents in Germany, and was a United States citizen at birth under Sec. 1993 Rev. Stat. U. S. Except for a visit of three years in the United States when he was brought here by his parents at the age of two years, the petitioner never returned to the United States again until 1927. That is to say, from 1905 when at the age of five years he was taken back to Germany by his parents, he made his home in Germany for twenty-two years, not returning to the United States until 1927. His father became a naturalized German citizen in 1917. The Court pointed out that Schaufus had resided in Germany from birth with the exception of a brief absence when a mere baby, until he was twenty-seven years old. His parents had established themselves as German citizens; he received his education in Germany, went to work and conformed as a German citizen to the laws and customs of Germany. There is nothing whatever to indicate that during the six years he remained in Germany subsequent to his attaining his majority, he ever gave the slightest evidence of claiming or intending to claim that he was an American citizen. The Court held further that the petitioner had lost the derivitive citizenship which he acquired by birth

from his father and it did not make any difference whether or not he had taken a German oath of allegiance.

It is the position of the appellant in this case that the petitioner had previously expatriated himself before the Nationality Act of 1940 went into operation in January, 1941, and that the principles set forth in the case of *Perkins* v. *Elg*, 307 U. S. 325, are applicable to the facts in this case as stated by the trial court in his first oral memorandum opinion (R. 227). By the Act of July 17, 1868, 16 Statutes at Large, 223, Congress declared that "the right of expatriation is a national and inherent right of all people." Expatriation is the voluntary renunciation and abandonment of nationality and allegiance. The Court pointed out in the Elg case that it has no application to the removal from the United States of a native citizen during minority. In other words, expatriation must be exercised after the petitioner attains the age of majority.

As has been pointed out, the petitioner's every action until he was at least thirty-four years of age indicated that he held himself out to be a British subject and a resident of Canada. He had every means of returning to the United States within a reasonable time after his twenty-first birthday but did not do so. He instead partook of the full advantages and privileges of a Canadian or British subject. Our Supreme Court in the Elg case, supra, has pointed out very distinctly that a minor, shortly after reaching twenty-one, who resided in a foreign country and claimed

to be a citizen of the United States must make some affirmative showing that he intends to continue or remain an American citizen. Here the petitioner did just the opposite and deliberately set out to disavow his American citizenship and assume that of a British subject until years later he decided that the United States would probably be the best place in which to live.

CONCLUSION

The judgment of the trial court entered on January 3, 1947 should be reversed and judgment should be rendered in conformity with the opinion of the trial court rendered on October 2, 1946 and the petitioner held to be a British subject and not an American citizen.

Respectfully submitted,

HARVEY ERICKSON,
United States Attorney

FRANK R. FREEMAN,
Assistant United States Attorney

APPENDIX

NATIONALITY CODE:

Sec. 801, Title 8, U.S.C.A. General means of losing United States Nationality.

A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by:

(a) Obtaining naturalization in a foreign state, either upon his own application or through the naturalization of a parent having legal custody of such person: Provided, however, That nationality shall not be lost as the result of the naturalization of a parent unless and until the child shall have attained the age of twenty-three years without acquiring permanent residence in the United States: Provided further, That a person who has acquired foreign nationality through the naturalization of his parent or parents, and who at the same time is a citizen of the United States, shall, if abroad and he has not heretofore expatriated himself as an American citizen by his own voluntary act, be permitted within two years from the effective date of his* chapter to return to the United States and take up permanent residence therein, and it shall be thereafter deemed that he has elected to be an American citizen. Failure on the part of such person to so return and take up permanent residence in the United States during such period shall be deemed

to be a determination on the part of such person to discontinue his status as an American citizen, and such person shall be forever estopped by such failure from thereafter claiming such American citizenship; or

(b) Taking an oath or making an affirmation or other formal declaration of allegiance to a foreign state; or

(c) Entering, or serving in, the armed forces of a foreign state unless expressly authorized by the laws of the United States, if he has or acquires the nationality of such foreign state; or

(d) Accepting, or performing the duties of, any office, post, or employment under the government of a foreign state or political subdivision thereof for which only nationals of such state are eligible; or

(e) Voting in a political election in a foreign state or participating in an election or plebiscite to determine the sovereignty over foreign territory; or

(f) Making a formal renunciation of nationality before a diplomatic or consular officer of the United States in a foreign state, in such form as may be prescribed by the Secretary of State; or

(g) Deserting the military or naval service of the United States in time of war, provided he is convicted thereof by a court martial; or

(h) Committing any act of treason against, or attempting by force to overthrow or bearing arms against the United States, provided he is convicted thereof by a court martial or by a court of competent jurisdiction. Oct. 14, 1940, c-876, Title I, Subchap. IV, S. 401, 54 Stat. 1168.

*So in original. Probably should read "this."

Sec. 802, Title 8, U.S.C.A. Presumption of expatriation.

A national of the United States who was born in the United States or who was born in any place outside of the jurisdiction of the United States of a parent who was born in the United States, shall be presumed to have expatriated himself under subsection (c) or (d) of Section 801, when he shall remain for six months or longer within any foreign state of which he or either of his parents shall have been a national according to the laws of such foreign state, and such presumption shall exist until overcome whether or not the individual has returned to the United States. Such presumption may be overcome on the presentation of satisfactory evidence to a diplomatic or consular officer of the United States, or to an immigration officer of the United States, under such rules and regulations as the Department of State and the Department of Justice jointly prescribe. However, no such presumption shall arise with respect to any officer or employee of the United States while serving abroad as such officer or employee, nor to any

accompanying member of his family. Oct. 14, 1940, c.876, Title I, Subchap. IV, S. 402, 54 Stat. 1169.

Sec. 903, Title 8, U.S.C.A. Judicial proceedings for declaration of United States nationality in event of denial of rights and privileges as national; certificate of identity pending judgment.

If any person who claims a right or privilege as a national of the United States is denied such right or privilege by any Department or agency, or executive official thereof, upon the ground that he is not a national of the United States, such person, regardless of whether he is within the United States or abroad, may institute an action against the head of such Department or agency in the District Court of the United States for the District of Columbia or in the District Court of the United States for the district in which such person claims a permanent residence for a judgment declaring him to be a national of the United States. If such person is outside the United States and shall have instituted such an action in court, he may, upon submission of a sworn application showing that the claim of nationality presented in such action is made in good faith and has a substantial basis, obtain from a diplomatic or consular officer of the United States in the foreign country in which he is residing a certificate of identity stating that his nationalty status is pending before the court, and may be admitted to the United States with such certificate upon the

condition that he shall be subject to deportation in case it shall be decided by the court that he is not a national of the United States. Such certificate of identity shall not be denied solely on the ground that such person has lost a status previously had or acquired as a national of the United States; and from any denial of an application for such certificate the applicant shall be entitled to an appeal to the Secretary of State, who, if he approves the denial, shall state in writing the reasons for his decision. The Secretary of State, with approval of the Attorney General, shall prescribe rules and regulations for the issuance of certificates of identity as above provided. Oct. 14, 1940, c. 876, Title I, Supchap. V, S. 503, 54 Stat. 1171.

IN THE

United States
Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THE ATTORNEY GENERAL OF THE UNITED STATES, *Appellant,*

vs.

WILLIAM WADE RICKETTS, *Appellee.*

NO. 11594

On Appeal From the District Court of the United States for the Eastern District of Washington Northern Division

BRIEF OF APPELLEE

GEORGE W. YOUNG,
502 *Paulsen Bldg., Spokane, Wash.*
Attorney for Appellee.

SHAW & BORDEN CO. 292441

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INDEX

CASES CITED

TEXTS CITED

STATUTES CITED

OPINION BELOW

The Trial Court rendered a memorandum opinion in favor of appellee. This was not reported. It is found at R. 345-356.

JURISDICTION

Jurisdiction of this action, which is one at law, is conceded by appellant. It is brought under 8 U. S. C. A. 903. (App. 14.)

APPELLEE'S STATEMENT OF THE CASE

Appellee was born at Hydro, Oklahoma, U. S. A., on February 3, 1902 (R. 10, 19). His parents were native born citizens of the United States (R. 10). At a time when he was approximately eight years of age, his parents homesteaded in Canada. His father became a British subject, being naturalized on the 31st day of December, 1914 (R. 170-171).

When appellee was in his seventeenth or eighteenth year, he served as school trustee and counsellor in a village called Meeting Lake, Sask. (R. 54). At or about the time appellee became twenty-one years of age, he expressed his intent to claim his natural right of American citizenship (R. 82-84). He resided in Canada until the year 1925 or 1926, the record is not entirely clear as to the exact date of his original departure from Canada (R. 11-12).

He first came to this country, following his original removal by his parents to Canada, in 1925 or 1926, crossing the border with a wife and child, declaring

himself to be a United States citizen (R. 158, 291-292). He took up residence in the Insley Apartments in Spokane and worked in and about Spokane for a period of six months (R. 11). He returned to Canada, and again came back to Spokane the following year, where he headquartered at the International Hotel for a period of six months, and engaged in timber work in districts neighboring Spokane (R. 12). He returned again to Canada where he lived until 1936.

Although not a registered voter in Canada, he was requested to and did vote in some election that was being held in the Province of Saskatchewan (R. 53-54).

In 1936 he returned to the United States and established a restaurant business shortly thereafter in the town of Twisp, Okanogan County, Washington (R. 14). While at Twisp he voted in local elections and participated in general civic life in that community (R. 15, 37-38).

He was arrested by U. S. immigration authorities, charged with being an alien unlawfully in the United States. He was tried, convicted, served ten days in the county jail and ordered deported (R. 14-15, 37). Following this experience, he again crossed the border between the Dominion of Canada and this country in the year 1939, finally locating in Spokane, Washington, where he established a restaurant business (R. 16). He was again apprehended by U. S. immi-

gration officers, charged with being an alien illegally within the country. He was advised by servants of the Department of Immigration and Naturalization to willingly depart the country, secure a passport and immigration visa and then come into the country as an immigrant (R. 16-17).

Convinced that he would be arrested and charged with a felony subject to two years in the penitentiary on conviction, and deported, appellee concluded to follow the course outlined by immigration officials. In the furtherance of such course, he signed various documents indicating that he was a Canadian citizen. He bowed to the conclusion of the Immigration Service that he was a British subject as it seemed to him to be the easiest solution of his problem. He did not waver, however, in his claim of citizenship (148-151).

During his life in the United States, he was consistent in his representation of being an American citizen. Statements in documents purporting to be a claim of citizenship other than American were made because of his urgent desire to enter and live in this country or in pursuit of an effort to extricate himself from the cloud placed upon his citizenship by reason of assertions of the U. S. Immigration and Naturalization Service (R. 148-151, 58-67).

His stay in the United States was continuous from 1936 on to the time of the trial of this case, except for interruptions forced upon him by the Immigration Service. He resided in Spokane continuously

since 1939 (R. 16). He has maintained business and property holdings continuously in this country (R. 16).

In the first week of January, 1943, he was again apprehended by the immigration authorities (R. 16). Under threat of prosecution he made a trip into Canada for the purpose of securing credentials which would enable him to re-enter the country (R. 16, 17, 37, 60).

Appellee registered and voted in elections in this country and assumed the burdens of citizenship. He registered under the Selective Service Act, disclosing to the Draft Board the fact of his conviction under naturalization laws (R. 32).

Appellee did not at any time take oath of allegiance to any country other than the United States, but to the contrary claimed that he owed his allegiance to the United States.

SUMMARY OF ARGUMENT

The Findings of Fact and Judgment should be affirmed because:

The findings are based on conflicting testimony.

Appellee acquired his citizenship by birth. The act of his father in becoming a naturalized citizen of Great Britain during appellee's minority did not deprive him of his right of U. S. citizenship acquired by birth.

Following his attainment of the age of twenty-one and continuously thereafter appellee claimed U. S. citizenship. No affirmative act of expatriation was established against him under any pertinent existing statute prior to the adoption of 8 U. S. C. A. 801 (Nationality Act of 1940), which by operation of its terms became effective on the 12th day of January, 1941.

At the time of the adoption of 8 U. S. C. A. 801, appellee was and had been continuously residing in the United States under the express declaration and determination of claiming his natural right of citizenship. Appellee is entitled to the benefit of the proviso in 8 U. S. C. A. 801-a.

ARGUMENT

"It is a well established principle that the trial court's findings of fact upon conflicting evidence will be binding on appeal and will not be disturbed by the appellate court where they are reasonably supported or sustained by some substantial, credible, and competent evidence, and where no error prejudicial to the appellant occurred in the ruling on the admission of evidence." 3 *Am. Jur.* (Appeal & Error) Sec. 901, p. 469-70;

Shopleigh v. Mier, 299 U. S. 468, 81 L. Ed. 355, 57 S. Ct. 261, 113 A. L. R. 253;

LaGrada v. U. S. (CCA 8th), 77 F (2d) 673, 103 A. L. R. 527, writ of certiorari denied in 296 U. S. 629, 80 L. Ed. 477, 56 S. Ct. 152;

Consolidated Flour Mills v. Ph. Orth. Co. (CCA 7th) 114 F (2d) 898, 132 A. L. R. 697.

APPELLEE IS NOT AN EXPATRIATE

His right of citizenship was guaranteed by the 14th Amendment to the Constitution of the United States (Appendix 13).

Congress has the right to make rules governing expatriation:

McKenzie v. Hare, 239 U. S. 299, 36 S. Ct. 106.

Until the enactment into law of the Nationality Act of 1940, a native born citizen could not lose his citizenship except by formal renunciation. The statutory enactment which provided for expatriation is the Act of March 2, 1907, 34 Stat. 1228, 8 U. S. C. A. 17 (now repealed by Nationality Act of 1940), the pertinent text of which is set for, Appendix 14.

Expatriation was, before the adoption of the Nationality Act of 1940, held to result from a compact, voluntarily entered into between the expatriate and the new state:

U. S. v. Eliason, (Dist. Ct., W. D. Wash. N. D.) 1926, 11 F (2d) 785;

Talbot v. Jenson (3 Dall.) 1 L. Ed. 540.

Residence abroad of a native born U. S. citizen however long, prior to the adoption of the Nationality Act of 1940, did not work a loss of citizenship:

Leong Kuai Yin v. U. S. (CCA 9th) 31 F (2d) 738 at 740;

Perkins v. Elg, 83 L Ed. 1320;

In re Tobiason, 36 Op. Atty. Gen. 535;

Hearings before Committee on Immigration & Naturalization, House of Representatives, 76th Congress, 1st Session, on H. R. 6127, superseded by H. R. 9980 (Nationality Act of 1940) p. 254, 268, 270, 275, 276, 278, 280.

Expatriation cannot be presumed by removal from the United States of a native citizen during minority:

Perkins v. Elg, 83 L. Ed. 1320, 1326;

U. S. v. Howe, (N. Y. 1916) 231 F. 546.

A minor being possessed of the right of citizenship cannot expatriate himself during his minority:

U. S. ex rel Baglivo v. Day (N. Y. 1928) 28 F. (2d) 44.

One owing allegiance to one state is deemed to continue such allegiance until disavowed and acceptance of him by another state:

Morse on Citizenship (1881), p. 160, Sec. 129, cited with approval in

Ex Parte Griffin, (N. Y. 1916), 237 F. 445 at 454.

Citizenship cannot be lost by treaty agreement:

In re Reid, 6 Fed. Supp. 800 (CCA), 73 F (2d) 153, not reviewed by Supreme Court for: application for certiorari not filed in time, 299 U. S. 544, Circuit Court opinion overruled by *Perkins v. Elg, supra.*

Voting in a foreign state did not, before Nationality Act of 1940, constitute an act of expatriation:

LaMoreaux v. Ellis (Mich. 1891), 50 N. W. 812.

In any event, before the Nationality Act of 1940, voting was not of significance with respect to intention to claim or not to claim citizenship:

U. S. v. Yasui (Ore. 1942), 48 Fed. Supp. 40.

And finally intention not to be expatriated may be shown:

State v. Jackson, 65 A. 657 (Vt. 1907);

Riley v. Hawes, 24 F (2d) 686.

If appellee became an expatriate, such status must have been acquired by reason of some affirmative act or acts done by him from which expatriation would be deemed to have resulted under then existing Federal Statutes.

The appellant, having asserted the expatriation of appellee, has the burden of proof thereof:

U. S. ex rel Belokumsky v. Todd, 68 L. Ed. 221;

Riley v. Hawes (CCA 1st), 24 F (2d) 686.

Until the effective date of the Nationality Act of 1940, a native born citizen whose parents during his minority became citizens of another state, acquired a dual citizenship. He was not deprived of his nat-

ural right of citizenship, and he acquired the benefit of the changed citizenship of his parent. This was thought to constitute an evil. In order to correct the anamoly of a person having the benefit of citizenship in this nation and also that of another state, the Nationality Act of 1940 was adopted by Congress. By design a proviso was inserted in sub-division A of Sec. 801, Title 8, U. S. C. A. This proviso in effect afforded an opportunity to all persons who had acquired foreign citizenship through the naturalization of their parent or parents and who were citizens of the United States living abroad, *and had not theretofore expatriated themselves under then existing law by their own voluntary acts, to return to the United States and take up permanent residence therein.*

Up until the Attorney General of the United States handed down his opinion in the Tobiason case (*In re Tobiason,* 36 Op. Atty. Gen. 535), the Department of Labor, which had theretofore been handling naturalization matters, had adhered to the rule that the minor child of a citizen living abroad could not be divested of his citizenship by his parents becoming naturalized in another country. The Tobiason case was reversed in the opinion written by the Supreme Court in *Perkins v. Elg,* 83 L. Ed. 1320.

It is quite clear from the hearings before the Committee on Immigration and Naturalization, House of Representatives, 76th Congress, 1st Session on H. R. 6127, superseded by H. R. 9980, that the purpose of Congress was to enact legislation which would be

prospective rather than retroactive, and would afford a clear cut rule for determining the intention of a minor child to claim his U. S. citizenship where his parent or parents became expatriated during his minority. The proviso now contained in sub-division A, Sec. 801, was successfully proposed by the Department of Labor as an amendment to the Nationality Act of 1940, codified as 8 U. S. C. A. 801-a. For purpose of convenience of the Court, we have set forth in the Appendix hereto material statements made by Mr. Shoemaker, who represented the Department of Labor in support of the proposed amendment which later became a part of the Act.

We have been advised that this Court has been supplied with a volume containing the complete transcript of the hearings before the Committee on Immigration and Naturalization and have hereinabove directed the Court's attention to other pages further bearing out the intent of Congress to provide for the return of persons having the right of citizenship to this country if living abroad.

It is conceded that at the time of the adoption of the Nationality Act of 1940, *appellee had returned to this country and had established permanent residence therein.*

CONCLUSION

WHEREFORE appellee does ever pray that the appeal of the appellant be denied and that the judgment of the Honorable Sam Driver, Judge of the District Court, be affirmed.

Respectfully submitted,

GEORGE W. YOUNG,

Attorney for Appellee.

APPENDIX

Constitution of the United States
14th Amendment

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Act of March 2, 1907-8 U. S. C. A. 17

" * * * Sec. 2. That any American citizen shall be deemed to have expatriated himself when he has been naturalized in any foreign state in conformity with its laws, or when he has taken an oath of allegiance to any foreign state.

" * * * And provided also, That no American citizen shall be allowed to expatriate himself when this country is at war."

NATIONALITY ACT OF 1940

"Sec. 801, Title 8, U. S. C. A. General means of losing United States Nationality.

A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by:

(a) Obtaining naturalization in a foreign state, either upon his own application or through the naturalization of a parent having legal custody of such person: Provided, however, That nationality shall not be lost as the result of the naturalization of a parent unless and until the child shall have attained the age of twenty-three years without acquiring permanent residence in the United States: Provided further, That a person who has acquired foreign nationality through the naturalization of his parent or parents, and who at the same time is a citizen of the United States, shall, if abroad and he has not heretofore expatriated himself as an American citizen by his own voluntary act, be permitted within two years from the effective date of his* chapter to return to the United States and take up permanent residence therein, and it shall be thereafter deemed that he has elected to be an American citizen. Failure on the part of such person to so return and take up permanent residence in the United States during such period shall be deemed to be a determination on the part of such person to discontinue his status as an American citizen, and such person shall be forever estopped by such failure from thereafter claiming such American citizenship;

8 U. S. C. A. 903

"Sec. 903, Title 8, U. S. C. A. Judicial proceedings for declaration of United States nationality in event of denial of rights and privileges as national; certificate of identity pending judgment.

'If any person who claims a right or privilege as a national of the United States is denied such right or privilege by any Department or agency, or executive official thereof, upon the ground that he is not a national of the United States, such person, regardless of whether he is within the United States or abroad, may institute an action against the head of such Department or agency in the District Court of the United States for the District of Columbia or in the District Court of the United States for the district in which such person claims a permanent residence for a judgment declaring him to be a national of the United States. If such person is outside the United States and shall have instituted such an action in court, he may, upon submission of a sworn application showing that the claim of nationality presented in such action is made in good faith and has a substantial basis, obtain from a diplomatic or consular officer of the United States in the foreign country in which he is residing a certificate of identity stating that his nationalty status is pending before the court, and may be admitted to the United States with such certificate upon the condition that he shall be subject to deportation in case it shall be decided by the court that he is not a national of the United States. Such certificate of identity shall not be denied solely on the ground that such person has lost a status previously had or acquired as a national of the United States; and from any denial of an application for such certificate the applicant shall be entitled to an appeal to the Secretary of State, who, if he approves the denial, shall state in writing the reasons for his decision. The Secretary of State, with approval of the Attorney General, shall prescribe rules and regulations for the issuance of certificates of identity as above provided. Oct. 14, 1940, c. 876, Title I, Subchap. V. S. 503, 54 Stat. 1171..''

STATEMENT OF THOMAS B. SHOEMAKER, DEPUTY COMMISSIONER, IMMIGRATION AND NATURALIZATION SERVICE, DEPARTMENT OF LABOR

MR. SHOEMAKER: To understand this issue here fairly, one has to go back just a short period to June 16, 1932. Prior to that time it had been the administrative view of the Department of Labor that a child could not be expatriated by the act of his parents by naturalization abroad. In other words, expatriation up to that time could not apply to a child whose parents were naturalized abroad. However, on June 16, 1932, the Attorney General handed down an opinion in the case of Ingrid Therese Tobiassen (36 Op. Atty. Gen. 535) in which he held that a child under such circumstances, being a minor and abroad, would lose its American citizenship by the act of the father or the parent becoming naturalized.

Necessarily the Department of Labor and the other departments were compelled to follow that ruling. We all had doubts. In any event, in the October 1938 term of the Supreme Court they handed down an opinion in the *Elg case* and that opinion reversed the views of the Attorney General in the *Tobiassen case* and held that the child could not be divested of its citizenship by the act of its parents. In other words, let me add right there that the Supreme Court laid down no hard and fast rule with respect to the loss of citizenship and that is the issue in this case and I ask that you Congressmen should read the opinion of the Supreme Court in that case.

I think even the State Department would concede that circumstances might govern such a case and that there is no hard and fast rule.

In our opinion, when this opinion of the Supreme Court was handed down in the *Elg case,* it reversed the views which have been expressed in the other case and which had been considered as the law of the land at that time when that law was drawn.

Now in regard to section 401, let me say that the Department of State and the Department of Labor have agreed that if this committee wishes, we will accept that as our views and not make any motion for an amendment to the code in any respect. We do believe, on the other hand, that if there is to be any amendment that a child or any person who has in good faith believed themselves to be an American citizen and represented and acted under that impression abroad should be given an opportunity within two years to return to the United States, and if they do not return within the period of two years the date of the approval of this act they are then forever estopped by such failure from thereafter claiming such American citizenship by virtue of the claims which they then have.

Now when the Tobiassen opinion was handed down by the Attorney General the Department told thousands of people they could not come across the border and those who accepted that opinion never made any attempt to come back although there were thousands

who had come in prior to that and they came in long after they had attained their majority. Up to that time many of these men who did not come back had labored and acted in good faith, being under the impression that they were good American citizens. Now why question their status? Why question the status of the individual who, for instance, has been away and always acted as a citizen and thought he was a citizen and has been stopped from coming back because the Department of Labor abided by that ruling? We say if those people have not done anything to expatriate themselves that then they as individuals should be given a period of time to return if they prefer to do so and a reasonable period of time should be granted for them within which to return.

Mr. Maciejewski: I believe I agree with you that there should be a time limit.

Mr. Rees: Now for the record: If we are going to write into the law a provision that says that they shall have a time limit of two years, or whatever it is, everyone can have that right.

In your opinion would you have that apply to all these people wherever they are throughout the world? Would you give all of them that right? Shall we put into the law then a statement that protects a lot of those people? Do you see what I mean, have a blanket section? Here are hundreds of thousands of people throughout the world and we are saying in respect to them that if they come into this country and live

here they may continue to be American citizens. Would that act apply to them as citizens who are entitled to the protection of this country wherever they are?

MR. SHOEMAKER: Since the fourteenth amendment to the Constitution was enacted in 1868 a person born in the United States would be a citizen of the United States by virtue of that amendment.

MR. MASON: It is the law of the land insofar as the Labor Department enforcement is concerned.

MR. SHOEMAKER: Yes; but we have a doubt.

MR. MASON: And the fact is that you put a hardship upon them because of that decision. Now you are saying that we are going to rectify this hardship by giving them at least two years within which to make an election. I am willing to go that far.

MR. FLOURNOY: That seems to assume they all wanted to do it but a number of those who tried to come back were prevented by the Tobiassen opinion. I think they would be comparatively small.

MR. REES: I assume that is correct.

MR. LESINSKI: Do I understand, Mr. Shoemaker, that under your amendment of this particular act that everyone would have a right to come in within two years?

MR. SHOEMAKER: That is right.

Mr. Lesinski: But what would happen about a child who left at the age of two years and is not ready for 20 years?

Mr. Shoemaker: He can come in under section 317 (a).

Mr. Lesinski: What do you mean by two years; after reaching the age of 21?

Mr. Shoemaker: I mean within two years of the effective date of this act.

Mr. Lesinski: After two years no one can come in? This is to take care of those now in. There are different ways of reading this and I do not take it that way.

Mr. Rees: The amendment proposed is this, that nationality shall not be lost as the result of naturalization of a parent unless and until the child shall have attained the age of 23 years.

Mr. Lesinski: In other words, this may go on for years and years.

Mr. Rees: Until he is 23 years in any event and those who are now beyond 21 years of age will have at least two years from the time of the passage of this act to establish their naturalization.

Mr. Shoemaker: May I add that unless some such clause is added to the act I anticipate that for years we will have these questions raised in the Department

of Labor as to the eligibility of a person to apply for citizenship just as we are doing today.

MR. REES: Before we close, I think the State Department has considered the amendment proposed by the Department of Labor. The State Department has no amendment to offer to that.

MR. FLOURNOY: I am authorized to say that if the committee favors the form of the Department of Labor, then the State Department would like to have an opportunity to suggest some modifications, including the question of the status of the child of these people born in that country. Are they to remain citizens of the United States indefinitely, born there many years after the naturalization in that country? Are they citizens? Usually the other parent would be a citizen of the country naturally where they are residing.

MR. MASON: That is the third generation that we are talking about.

MR. CURTIS: I am not sure whether I get that, but on the point that you raise there, does everybody understand what that situation was?

MR. REES: The Labor Department amendment raises the question unnecessarily, but I think that it is something that is to be considered. I would like to have it cleared up by some legal authority.

MR. CURTIS: May I give an illustration in regard to that?

Mr. Rees: Yes.

Mr. Curtis: We will imagine that a man is 21 years of age and under the present law he is a citizen of the United States and he has now two years in which to elect. Let us suppose for some reason or other he has not been called to military duty in the country where he is living and say he is called after he is 21 years old, probably one month after 21. Now, I would understand from the arguments I have heard this morning that that man can claim the protection of the United States, can't he?

Mr. Mason: Assuming if this were the law of the land.

Mr. Lesinski: Then he would have to leave and come over here, if they would permit him to come over here.

Mr. Curtis: During the two years he can exercise the protection of the United States.

Mr. Lesinski: Yes; but in the very same case that you are talking about where he was inducted in the army, he would have to go because he would be forced in although he is claiming American citizenship.

Mr. Flournoy: I think it is pretty well established as a proof of dual nationality and his living in one country would not entitle him to the protection of the other country, if he is a national of both countries. Also we had cases like that in the last war. One of

these persons had been naturalized here through his parents becoming citizens of the United States. We put him in the Army. If any foreign government made a protest we would certainly not pay any attention to it. He is living here and a citizen of the United States and he is just as much obligated to serve in the Army as anyone else.

Mr. Mason: Accordingly, if we pass the two-year limitation it would not change the status of these people whatever during the two-year period. They would not get any more protection other than they do now.

Mr. Flournoy: They would not be entitled to it, although they might claim it.

Mr. Van Zandt: We might offer the protection and the young man might object to remaining in the army of a foreign country but they would not pay any attention to him.

Mr. Lesinski: We will adjourn this meeting until Tuesday morning at 10 o'clock.

(Thereupon, at 12:30 p. m., the hearing adjourned to meet on Tuesday, May 7, 1940, at 10 a. m.)

NO. 11594

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THE ATTORNEY GENERAL OF THE UNITED STATES, *Appellant*,

vs.

WILLIAM WADE RICKETTS, *Appellee.*

On Appeal From the District Court of the United States for the Eastern District of Washington Northern Division

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REPLY BRIEF OF APPELLANT

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GREEN-HUGHES PTG CO., SPOKANE

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---

REPLY BRIEF OF APPELLANT

RE. APPELLEE'S STATEMENT OF FACTS

A brief but accurate statement of the facts of this case can be gathered both from the appellant and appellee's brief already on file herein. Appellee, in his brief (p. 1), points out that he expressed his intent to claim his natural right to American citizenship about the time he became twenty-one years of age. This testimony was given by an uncle, Marion

Ricketts. (R. 82.) He stated that Ricketts made this declaration in 1920. (R. 82.) Appellee was then nineteen years of age and the trial judge admitted this testimony, stating that it might have some probative value as indicating what his intention may have been afterwards. (R. 83.)

There are no records available of appellee's visits or entry into the United States prior to 1936. The only evidence is the appellee's statement to the effect of his earlier entries in hearings conducted by the Immigration Department. As the trial judge pointed out he only remained in the United States eleven months during the first thirteen years after becoming twenty-one years of age. (R. 239). The appellee was under no compulsion, according to his theory of the case, from the Immigration Service but was a free agent as he had not even contacted the Immigration Service before 1936 as far as any records are concerned. Nevertheless, he voluntarily remained out of the United States for this length of time.

The claim is made by the appellee that he did not take the oath of allegiance to any country other than the United States, but on the contrary claimed that he owed his allegiance to the United States. (Br. 4.)

In only one place in the record (p. 82) does it appear that he ever claimed to be an American citizen and that claim was made to his uncle in Canada during minority. He did not at any later time make any declaration or claim to anyone in the United States that he was a citizen, until this case was pending, or

exercise any rights of citizenship here in the United States with the single possible exception that he did vote in the municipal election at Twisp. On the other hand, his voting record in Canada is fairly complete with the additional fact that he held public office there. Although it is not shown that he took any oath of allegiance to Canada or to Great Britain certainly in order to vote he had to declare himself to be a British subject and, in order to hold office in Canada, he must declare himself to support the laws in Canada in the same manner as one qualifying for public office in the United States must take an oath that he will support the laws and constitution of the United States.

ANSWER TO APPELLEE'S ARGUMENT

Appellant agrees with the appellee's statement that mere residence of a United States citizen abroad, however long, would not work a loss of citizenship. The case of *Leong Kuai Yin* v. *United States* (C. C. A. 9) 31 F (2d) 738, cited by appellee, is not applicable to the facts in this case because in that case Yin merely remained in China three years after reaching his twenty-first birthday, but did not hold office or vote there.

It is also conceded that a minor cannot lose his citizenship during minority by serving in the army of a foreign nation. Acts committed during minority by a minor are not binding on him except, as Judge Driver pointed out, they help to explain later conduct.

The case of *Ex Parte Griffin* (N. Y. 1916) 237 Fed. 445, cited by appellee (Br. 8) holds that a citizen of the United States who moved to Canada with his family and there took the oath to defend the king and entered the army voluntarily released his American citizenship and became a British subject.

The case of *In re Reid*, 6 Fed. Supp. 800, 73 F (2d) 153, cited by appellee, was a similar case in which the girl was held to be an American citizen. In that case the petitioner was born at Newport, Iowa, in 1901, of native parents, who went to Canada with her in 1904. The parents there acquired a Canadian homestead. Her father became a British subject in 1907 in order to acquire a patent or title to the homestead. The daughter took no other steps toward becoming a British subject. She entered the United States in 1933 and was declared to be an American citizen. The facts in this case are altogether different from the facts in the Reid case, in that no affirmative action was taken by the petitioner toward becoming a British subject.

The case of *LaMoreaux* v. *Ellis* (Mich. 1891) 50 N. W. 812, cited by appellee (Br. 9) is not applicable here. That case was a quo warranto proceeding to test the title to a public office. The evidence on both sides was declared to be hearsay and the action was dismissed because the person seeking the office could show no title to it. It cannot be seen how the LaMoreaux case is even similar to the issues involved in this case.

The case of *United States* v. *Yasui* (Ore. 1942), 48 Fed. Supp. 40 (Br. 9), was a criminal curfew violation case. The defendant was born in the United States of alien Japanese parents. In that case the court laid down the principle that, by virtue of his birth within the territorial limits of the United States, upon his majority he should decide whether he would elect Japanese or American citizenship. The court further held that the attitude of the defendant is a mental act which can be ascertained as criminal intent is ascertained. In that case the court held that his acts indicated that he was not an American citizen.

The cases of *State* v. *Jackson*, 65 A. 657 (Vt. 1907), and *Riley* v. *Hawes*, 24 F. (2d) 686, hold that removal to Canada during minority of an American citizen does not divest him of such citizenship, but that it can only be lost by voluntary acts subsequent to obtaining the age of majority, also, that the burden of proof was on the United States in expatriation cases. With this principle the appellant has no quarrel, since the Attorney General is the plaintiff in the case and plaintiff must assume the burden of proof.

Under the Nationality Act of 1940, Title 8, USCA, Section 801, the right was extended to persons for two years who *had not theretofore expatriated themselves under then existing law by their own voluntary acts, to return to the United States and take up permanent residence therein.*

The whole difference between appellant and appellee's theory in this case is that appellant contends the appellee had, prior to coming to the United States in 1936, expatriated himself by his own voluntary acts, deeds and conduct in Canada to such an extent that he could not then claim to be an American citizen. This contention has been thoroughly discussed in appellant's opening brief and will not again be argued here.

THE WEIGHT OF THE COURT'S FINDINGS ON CONFLICTING EVIDENCE

Appellee contends that it is a well established principle of law that the trial court's findings will not be disturbed by the appellate court where they are reasonably supported by or sustained by some substantial, credible, and competent evidence. 3 Am. Jur., (Appeal & Error) Sec. 901, p. 469-70. The appellant is in accord with this expression of law and wishes to emphasize that the trial court first rendered an opinion in favor of the appellant. (R. 227) In this opinion the evidence is carefully analyzed and resolved in favor of the appellant on a carefully analyzed factual discussion of the testimony in which it is pointed out by the trial court that the appellant's actions and conduct over a period of years in Canada would expatriate him and make him a British subject.

The court later, after a motion for a new trial, reversed itself and decided the case entirely on the committee report, based upon the hearings on the

workability and application of the Nationality Act of 1940. (R. 345). In this opinion the court made perfectly clear that the former opinion was being set aside on the basis of his interpretation of the committee report alone upon the intent and the meaning of the act and not on the basis of the testimony of witnesses and the evidence introduced at the trial of the case.

Under these circumstances, the full weight and credit of the court's analysis and witnesses and circumstances deducible therefrom must be resolved in favor of the appellant. The court says:

> "I might say this, that the court hasn't changed its view of the facts in this case, and I propose to sign findings which show simply the bare facts of his having been born here, having been taken to Canada, the time he returned, and the length of time he has lived here, and then I would of course omit the conclusions as to the effect of that residence in the present findings. I think in one of them there is a finding there that he isn't a resident of this district. I would change that, of course, and find that he is a resident of the district, and then conclude that he is a national of the United States and entitled to the relief sought. I am basing that, of course, upon the second proviso of this Act. It may be that the Circuit Court of Appeals will take the view that under the facts he has expatriated himself regardless of the statute, but that will be in your record and my findings wouldn't change that one way or the other. Do you understand what the court has in mind?"

As against the appellee's present contention that he at no time, by act, conduct or deed, while in

Canada, voluntarily relinquished his American citizenship, we have many bits of evidence to the contrary. These consist of questionaires filled out by the appellee and statements given by him while under oath before proper officers of the United States Immigration and Naturalization Service who conducted hearings in his case. A typical example is Defendant's Exhibit 17. (R. 317) Ricketts testified at that hearing that when he became of age it was his intention to remain in Canada indefinitely and assume the rights and privileges of Canadian citizenship. Also, he stated that he had always considered himself a Canadian citizen and had never made any claim to United States citizenship. (R. 322) He further testified (R. 321) that, when he entered the United States at Eastport in 1926, he was admitted as a Canadian citizen and made no claim to United States citizenship. It will thus be seen that, at the time Ricketts was given this hearing on the deportation proceedings on August 2, 1943, he made no claim that he was under duress, compulsion or suggestion by the United States immigration authorities and stated unequivocally at that time that he was a Canadian citizen.

Ricketts further testified that he was a registered voter when he voted in the provincial election in Canada in 1927, and that when he attempted to vote in 1930 he was not permitted to do so because he was out of his home constituency when he registered. (R. 317)

Ricketts registered under the provisions of the Selective Service and Training Act in the United States. His selective service questionaire appears as Defendant's Exhibit No. 1 (R. 32), wherein he stated that he was not a citizen of the United States, but was last a citizen of Canada. Certainly his argument fails that he was under the compulsion of the Immigration Service when he registered in the United States as a Canadian. The Immigration Service had nothing whatever to do with his registration. He was dealing with an independent agency of the United States government and had no hesitation in claiming to be an alien when he registered on May 7, 1942.

CONCLUSION

In conclusion it should be pointed out that the United States Supreme Court, in *Perkins* v. *Elg*, 83 L. Ed. 1320, 307 U. S. 325, provides three ways in which citizenship at birth can be lost. The court stated:

> "United States citizenship at birth is deemed to continue unless one is deprived of it through the operation of a treaty, by Congressional enactment, or by voluntary action in conformity with applicable legal principles."

It is submitted that appellee comes under the last section, having lost his American citizenship by voluntary action. Having once made his election of British citizenship, he could not make a subsequent election under the Nationality Act of 1940, because that act only applies to one who has not already expatriated

himself by his own voluntary act. It is submitted that the acts and conduct of the appellee, at least until May 7, 1942, when he registered as a Canadian alien before the draft board in Spokane, indicated beyond any doubt that in war time he accepted fully the benefits of Canadian citizenship and, when coupled with his activities in Canada, show beyond any doubt that he had already expatriated himself long before the Nationality Act of 1940 took effect and so did not maintain his dual citizenship so that he could take or accept any benefits under the Nationality Act of 1940.

Respectfully submitted,

HARVEY ERICKSON
United States Attorney

FRANK R. FREEMAN
Assistant United States Attorney

No. 11,595

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

DORSEY MCMAHAN,

Appellant,

vs.

JAMES A. JOHNSTON, Warden,
United States Penitentiary,
Alcatraz Island, California,

Appellee.

BRIEF FOR APPELLEE.

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Appellee.

BRIEF FOR APPELLEE.

JURISDICTIONAL STATEMENT.

This is an appeal from an order of the United States District Court for the Northern District of California, hereinafter called the "Court below", denying appellant's petition for writ of habeas corpus, and discharging the order to show cause. (Tr. pp. 20-21.) The Court below had jurisdiction of the habeas corpus proceedings under Title 28 U. S. C. A. Sections 451, 452 and 453. Jurisdiction to review the District Court's order denying the petition is conferred upon this Court by Title 28 U. S. C. A. Sections 463 and 225.

STATEMENT OF THE CA

The appellant, an inmate of th
Penitentiary at Alcatraz, California
for writ of habeas corpus (Tr. pp. 1-
below issued an order to show ca
Thereafter the appellee filed a ret
show cause (Tr. pp. 9-12) and th
filed a traverse to return order (Tr
a traverse on return to order to show
17-19.) The matter was then submitt
below filed the following order den
for writ of habeas corpus and disch
to show cause:

> "The motion of respondent to
> tioner's fourth petition for writ
> for the reason that the said ap
> state a cause of action is well t
>
> "Petitioner by the allegation
> has himself clearly established th
> for a violation of Title 18 U. S.
> eral Escape Act), about which h
> is a valid one. He admits that
> in custody by virtue of process
> laws of the United States, his
> the physical custody of a City

commissioner * * * who escapes or attem
to escape from such custody * * * shall
guilty of an offense * * *'.

"From a reading of the foregoing langu
of the statute, it may be conclusively asse
that petitioner's argument has no basis in l
or in law.

"IT IS THEREFORE ORDERED that
petition herein be, and the same is, hereby den
and the order to show cause discharged.

Dated: March 7th, 1947.

MICHAEL J. ROCHE,
United States District Judg

From this order appellant now appeals to this H
orable Court. (Tr. p. 22.)

QUESTION.

Was the Court below under an obligation to p
duce the body of appellant before it to determ
if he was entitled to his discharge?

CONTENTION OF APPELLEE.

The answer to the above question is No.

the merits of appellant's petition on the order to show cause.

Walker v. Johnston, 312 U. S. 275, 284.

Actual physical restraint is not required under the Federal Escape Statute; the word "custody" means simply power, authority or responsibility to control or maintain charge of the prisoner.

Giles v. United States, (CCA-9th) 157 F. (2d) 588, Certiorari denied April 28, 1947. ..... U. S.....

Finally, appellee, is in complete accord with the reasoning of Judge Roche and the statutory authority cited in his order denying appellant's application for writ of habeas corpus and hereby adopts them in toto, together with the decision of this Honorable Court in the case of *Giles v. United States,* supra, as his complete argument on this appeal.

CONCLUSION.

In view of the foregoing, it is respectfully submitted that the order of the Court below in denying the petition for writ of habeas corpus is correct and should be affirmed.

Dated: San Francisco, California,
June 27, 1947.

FRANK J. HENNESSY,
United States Attorney,

JOSEPH KARESH,
Assistant United States Attorney,

Attorneys for Appellee.

No. 11596

United States

Circuit Court of Appeals

For the Ninth Circuit.

HENRY BRODERICK, INC.,

Appellant,

vs.

CLARK SQUIRE, individually and as Collector of Internal Revenue for the District of Washington,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the Western District of Washington Southern Division

Rotary Colorprint, 870 Brannan Street, San Francisco 6-4-47—60

No. 11596

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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ATTORNEYS OF RECORD

MESSRS. EGGERMAN, ROSLING & WILLIAMS,

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Assistant United States Attorney,
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Tacoma, Washington,

THOMAS R. WINTER, ESQ.,
Special Assistant to the Chief Counsel,
Bureau of Internal Revenue,
Smith Tower,
Seattle, Washington,
Attorneys for Defendant-Appellee.

In the United States District Court for the
Western District of Washington
Southern Division

No. 832

HENRY BRODERICK, INC.,

Plaintiff,

vs.

CLARK SQUIRE, individually and as Collector of Internal Revenue for the District of Washington,

Defendant.

COMPLAINT

Comes Now plaintiff and for first cause of action against defendant, alleges:

I.

That plaintiff at all times herein mentioned was and now is a corporation, duly organized and existing under the laws of the State of Washington, with all license fees last due said state paid.

II.

That defendant at all times herein mentioned was and now is a resident of Tacoma, Pierce County, Washington, and the duly appointed, qualified and acting Collector of Internal Revenue for the District of Washington, with his principal office at Tacoma, Washington.

III.

That this action arises under the laws of the United States providing for internal revenue, being a suit for the recovery of internal revenue taxes erroneously and illegally assessed and collected under the Federal Insurance Contributions Act, Subchapter A of Chapter 9 of the Internal Revenue Code, 26 USCA Section 1400-1432, as amended, as hereinafter more fully appears.

IV.

That for many years plaintiff has been engaged as a duly licensed broker, with offices in the city of Seattle, King County, Washington, in the rental, lease and sale of real estate. That plaintiff conducts a general real estate business independently and has also operated in association with other independent brokers as joint adventurers in the rental, [1*] lease and sale of real estate.

V.

That the contract between plaintiff and each of such independent brokers is in writing, a copy of such written contract, except as to date of execution and as to name, being attached hereto as Exhibit A, and made a part hereof.

VI.

That under the contracts and in all their operations herein referred to, such brokers have constantly been free from any control or direction of plaintiff, and have operated their respective businesses in accordance with their entire and uncon-

trolled discretion, and only at such hours or times as they themselves might elect. That the labors and activities of such independent brokers in the conduct of their businesses and in the exhibition of properties and in effecting sales, rentals and leases of real estate are performed chiefly in the field and not in offices. That said brokers pay their own expenses and all fees or taxes arising from their activities as brokers, and obtain and maintain their individual brokers' licenses and have customarily engaged in the business of independent real estate brokerage. That said brokers are not employees of plaintiff, but are co-principals with plaintiff in joint adventures in the real estate brokerage business, and that plaintiff and such brokers have an equal proprietary interest in the commissions earned thereby, and one-half of such commissions are simultaneously received by such brokers, not as compensation paid by plaintiff for services performed by such brokers for plaintiff as their employer but as co-principals with plaintiff and by plaintiff.

VII.

That under date of July 30, 1945, plaintiff was notified of the assessment of additional internal revenue taxes for the period April 1, 1943, to March 31, 1945, on the ground that said independent brokers were taxable employees of plaintiff under said Federal Insurance Contributions Act, and demand was made upon it that said tax in the sum of $1,938.63 be paid within ten days thereof.

That said brokers and the amount of [2] said tax applicable to each are set forth in a schedule attached hereto as Exhibit B and made a part hereof.

VIII.

That on August 3, 1945, plaintiff paid said sum to defendant under protest.

IX.

That on or about August 11, 1945, plaintiff duly filed with defendant as Collector of Internal Revenue for the District of Washington, for consideration of the Commissioner of Internal Revenue, its claim for refund of said sum, Claim No. 481703.

X.

That under date of January 2, 1946, the Commissioner of Internal Revenue notified plaintiff that its claim for refund was disallowed.

XI.

That the assessment and collection of said taxes in the amount of $1,938.63 and the disallowance of said claim for refund thereof were erroneous, illegal, capricious and wrongful, since none of the individuals in respect to whom said taxes were assessed were employees of plaintiff within the meaning of said act. That plaintiff is entitled to a refund of, and defendant is indebted to plaintiff for the said sum of $1,938.63, with interest at 6% per annum from August 3, 1945.

And for a second and further cause of action against defendant, plaintiff alleges:

I.

That Paragraphs I and II of plaintiff's first cause of action are, by this reference, incorporated herein and made a part hereof.

II.

That this action arises under the laws of the United States providing for internal revenue, being a suit for the recovery of internal revenue taxes erroneously and illegally assessed and collected under the Federal Unemployment Tax Act, Subchapter C of Chapter 9 of the Internal [3] Revenue Code, 26 USCA Section 1600-1611, as amended, as hereinafter more fully appears.

III.

That Paragraphs IV, V and VI of plaintiff's first cause of action, are, by this reference, incorporated herein and made a part hereof.

IV.

That under date of July 26, 1945, plaintiff was notified of the assessment of additional internal revenue taxes for the period from January 1, 1943, to December 31, 1943, on the ground that said independent brokers were taxable employees of plaintiff under said Federal Unemployment Tax Act, and demand was made upon it that said tax in the sum of $1,042.00 be paid within ten days thereof. That said brokers and the amount of said tax applicable to each are set forth in a schedule attached hereto as Exhibit B and made a part hereof.

V.

That on August 3, 1945, plaintiff paid said sum to defendant under protest.

VI.

That on or about August 11, 1945, plaintiff duly filed with defendant as Collector of Internal Revenue for the District of Washington, for consideration of the Commissioner of Internal Revenue, its claim for refund of said sum, Claim No. 814304.

VII.

That under date of January 2, 1946, the Commissioner of Internal Revenue notified plaintiff that its claim for refund was disallowed.

VIII.

That the assessment and collection of said taxes in the amount of $1,042.00 and the disallowance of said claim for refund thereof were erroneous, illegal, capricious and wrongful, since none of the individuals in respect to whom said taxes were assessed were employees of plaintiff within the meaning of said act. That plaintiff is entitled to a refund of, [4] and defendant is indebted to plaintiff for the said sum of $1,042.00, with interest at 6% per annum from August 3, 1945.

And for a third and further cause of action against defendant, plaintiff alleges:

I.

That Paragraphs I, II, and III of plaintiff's second cause of action are, by this reference, incorporated herein and made a part hereof.

II.

That under date of July 26, 1945, plaintiff was notified of the assessment of additional internal revenue taxes for the period from January 1, 1944, to December 31, 1944, on the ground that said independent brokers were taxable employees of plaintiff under said Federal Unemployment Tax Act, and demand was made upon it that said tax in the sum of $1,380.05 be paid within ten days thereof. That said brokers and the amount of said tax applicable to each are set forth in a schedule attached hereto as Exhibit B and made a part hereof.

III.

That on August 3, 1945, plaintiff paid said sum to defendant under protest.

IV.

That on or about August 11, 1945, plaintiff duly filed with defendant as Collector of Internal Revenue for the District of Washington, for consideration of the Commissioner of Internal Revenue, its claim for refund of said sum, Claim No. 814305.

V.

That under date of January 2, 1946, the Commissioner of Internal Revenue notified plaintiff that its claim for refund was disallowed.

VI.

That the assessment and collection of said taxes in the amount of $1,308.05 and the disallowance of said claim for refund thereof, [5] were erroneous,

illegal, capricious and wrongful, since none of the individuals in respect to whom said taxes were assessed were employees of plaintiff within the meaning of said act. The plaintiff is entitled to a refund of, and defendant is indebted to plaintiff for said sum of $1,380.05, with interest at 6% per annum from August 3, 1945.

Wherefore, plaintiff prays for judgment against defendant as follows:

1. On the first cause of action for the sum of $1,938.63, together with interest thereon as provided by law.

2. On the second cause of action for the sum of $1,042.00, together with interest thereon as provided by law.

3. On the third cause of action for the sum of $1,380.05, together with interest thereon as provided by law.

4. For such other and further relief in the premises as may be judged equitable, including plaintiff's costs and disbursements herein.

EGGERMAN, ROSLING & WILLIAMS,

/s/ ROBERT G. MOCH,
Attorneys for Plaintiff. [6]

EXHIBIT B

Name of Individual to whom tax applicable	Salary from April 1, 1943 to March 31, 1945 to which Federal Insurance Contribution Act applied	Salary from Jan. 1, 1943 to Dec. 31, 1943 to which Federal Unemployment Act applied	Salary from Jan. 1, 1944 to Dec. 31, 1944 to which Federal Unemployment Act applied
Levison, Harry E.	$ 6,312.50	$ 3,000.00	$ 3,000.00
McKenzie, Grace E.	1,367.75	1,395.74	598.12
Samsel, Howard Z.	6,443.08	3,000.00	3,000.00
Hatfield, Jessie	7,687.27	3,000.00	3,000.00
Eddy, Howard M.	6,843.69	3,000.00	3,000.00
Bangasser, Paul E.	6,349.93	3,000.00	3,000.00
Wilson, Melville	7,596.33	3,000.00	3,000.00
Schofield, James	528.25	125.00	403.25
Charteris, Myrtle	3,575.78	669.45	2,202.89
Said, A. A.	670.75	645.75	25.00
McCracken, J. D.	6,000.00	3,000.00	3,000.00
Bean, Harold R.	127.12	179.10	52.50
Runkel, Henry G.	5,897.99	3,000.00	3,000.00
Mills, H. Dennis	50.00	547.49	.....
Fleming, John H.	7,027.87	2,796.26	3,000.00
Payne, Lorin A.	5,200.00	1,361.25	3,000.00
Downs, M. Ross	6,095.00	95.00	3,000.00
Levenson, Samuel	115.31	115.31	.....
Evans, Paul G.	5,154.38	.....	3,000.00
McRae, Angus	649.94	.....	649.94
McLean, L. L.	1,740.58	.....	1,740.58
Rorabeck, Calvin M.	2,549.95	.....	1,825.83
Holcombe, S. R.	1,732.08	.....	1,259.58
Barton, Fred	941.25	.....	.....
Leitch, Robert	825.00	.....	.....
Total Salary	91,481.80	31,930.35	44,757.69
Tax thereon	1,829.66	957.91	1,342.73
Interest Paid	108.97	84.09	37.32
Total Assessment	$ 1,938.63	$ 1,042.00	$ 1,380.05

[Endorsed]: Filed Feb. 13, 1946. [7]

[Title of District Court and Cause.]

ANSWER

Now comes Clark Squire, defendant, by and through J. Charles Dennis, United States Attorney for the Western District of Washington, and in answer to the first cause of action alleged by plaintiff in its complaint, admits, denies, and alleges as follows:

I.

Defendant admits all of the allegations contained in paragraph I thereof, except he states that he has no knowledge or information sufficient to form a belief as to the truth of plaintiff's allegation that all license fees last due said state have been paid.

II.

Defendant admits all of the allegations contained in paragraph II thereof.

III.

Defendant admits all of the allegations contained in paragraph III thereof except he denies that said internal revenue taxes were erroneously and illegally assessed and collected. [8]

IV.

Defendant states that he has no knowledge or information sufficient to form a belief as to the truth of plaintiff's allegations contained in paragraph IV thereof.

V.

Defendant states that he has no knowledge or information sufficient to form a belief as to the truth

of plaintiff's allegations in paragraph V thereof, except defendant admits that a written contract form identified as Exhibit A is attached to the complaint.

VI.

Defendant denies all of the allegations contained in paragraph VI thereof.

VII.

Defendant admits all of the allegations contained in paragraph VII thereof, except he denies that said so-called "brokers" were in fact brokers in their said dealing with plaintiff.

VIII.

Defendant admits all of the allegations contained in paragraph VIII thereof, except he denies that said sum was paid on August 3, 1945, and alleges that same was paid on August 4, 1945.

IX.

Defendant admits all of the allegations contained in paragraphs IX and X thereof.

X.

Defendant denies all of the allegations contained in paragraph XI thereof.

Now comes the defendant, as aforesaid, and in answer to the second cause of action alleged by plaintiff in its complaint, admits, denies and alleges as follows: [9]

I.

In answer to paragraph I thereof defendant states that paragraphs I and II of defendant's an-

swer to plaintiff's first cause of action are by this reference incorporated herein and made a part hereof.

II.

Defendant admits all of the allegations contained in paragraph II thereof except he denies that said internal revenue taxes were erroneously and illegally assessed and collected.

III.

In answer to paragraph III thereof defendant states that paragraphs IV, V and VI of defendant's answer to plaintiff's first cause of action are by this reference incorporated herein and made a part hereof.

IV.

Defendant admits all the allegations contained in paragraph IV thereof except he denies that said so-called "brokers" were in fact brokers in their said dealing with plaintiff.

V.

Defendant admits all the allegations contained in paragraphs V, VI and VII thereof, except he denies that said payment was made by plaintiff on August 3, 1945, and alleges that same was made on August 4, 1945.

VI.

Defendant denies all of the allegations contained in paragraph VIII thereof.

Now comes the Defendant, as aforesaid, and as to the third cause of action alleged by Plaintiff in its complaint, admits, denies and alleges as follows:

I.

In answer to paragraph I thereof Defendant states that paragraphs I, II and III of Defendant's answer to Plaintiff's second cause of action are by this reference incorporated herein and made a part hereof.

II.

Defendant admits all the allegations contained in paragraph II thereof, except he denies that said so-called "brokers" were in fact brokers in their said dealings with plaintiff.

III.

Defendant admits all the allegations contained in paragraphs III, IV and V thereof except he denies that said sum was paid by plaintiff on August 3, 1945, and alleges that the same was paid on August 4, 1945.

IV.

Defendant denies all the allegations contained in paragraph VI thereof.

Wherefore Defendant prays for judgment, dismissing the Plaintiff's complaint herein, costs of suit and such other and further relief to which the Court may deem the Defendant entitled.

J. CHARLES DENNIS,
United States Attorney.
HARRY SAGER,
Assistant United States Attorney.
THOMAS R. WINTER,
Special Assistant to Chief Counsel.

[Endorsed]: Filed April 19, 1946. [11]

[Title of District Court and Cause.]

MEMORANDUM OPINION

The plaintiff, Henry Broderick, Inc., seeks a judgment for refund of taxes and interest collected by the defendant, Clark Squire, Collector of Internal Revenue. The issue presented by this controversy is whether the persons upon whose earnings the tax was collected were in fact employees within the meaning of the Social Security Act, or whether they were independent contractors.

The statutes and regulations involved are:

Federal Insurance Contributions Act,
26 USCA, Sec. 1400-1432, as amended.
Federal Unemployment Tax Act,
26 USCA, Sec. 1600-1611.

Neither of the two Federal statutes referred to define the term "employee."

The regulation involved is designated as Sec. 402.204 of Regulation 106. This regulation states:

> "Every individual is an employee if the [12] relationship between him and the person for whom he performs services is the regular relationship of employer and employee."

It then provides:

> "In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means or methods of accomplishing the result, he is an independent contractor."

For the purpose of further clarifying the regulation, in April, 1943, the Acting Commissioner of Internal Revenue in Mimeograph 5504 Accumulative Bulletin, January, 1943, page 1066, ruled that real estate salesmen are employees of brokers for Federal Employment Tax purposes even though their compensation is based upon commissions from sales.

The facts as disclosed by the record in this case, from documentary and oral evidence offered at the time of trial by the plaintiff—there being no evidence offered by the defendant—may be briefly summarized as follows:

A written agreement was entered into by the plaintiff with the persons whose remuneration became the subject of the tax herein. This agreement provided that one engaged in selling real estate in connection with the plaintiff's activities in that field must be the holder of a real estate broker's license of the State of Washington, in full force and effect. It also provided that it was the intent of the plaintiff and the persons who signed the agreement that the relationship between them was that of "an independent contractor, and not a servant, employee, joint adventurer or partner." The brokers agreed to sell real estate for clients of the plaintiff upon a commission basis. Such sales were made of properties listed with the plaintiff and all contractual relationships between the owner of the property and the seller of the property were with the plaintiff herein. The commission received from such activity became the property of the plaintiff. When a transaction was finally consummated and commis-

sions were paid, the plaintiff would divide the proceeds of such commission equally between [13] itself and the individual broker who made the sale. The plaintiff maintained an office properly equipped with furnishings and staff suitable to serving the public as a real estate broker. It was one of the leading and well known real estate brokerage concerns in the City of Seattle enjoying the goodwill of and a reputation for fair dealing with the public. Each broker was supplied with desk room in the plaintiff's office, as well as telephone, switchboard service and reasonable and necessary stenographic services, and the plaintiff in its sole discretion might mention in its advertising the name of the person engaged in selling. All current listings were available to such brokers; the plaintiff, however, reserving the right to place in the temporary possession of any one of them exclusive privileges of sale. Regular sales meetings were attended by both its salaried real estate salesmen and the brokers herein involved, though there was no compulsory requirement that a broker be in attendance. At these meetings discussions were had regarding matters of the business of selling, and assignments of listed property were made by the plaintiff. Any broker was free to make a choice of listings but this was subject to such limitations as the plaintiff might impose. Either the plaintiff or its brokers might terminate the relationship existing between them at will, and generally the brokers were given a free hand as to whether they would devote all or part of their time to the service of selling listed real

estate for the plaintiff, although, on the other hand, if they should undertake to sell real estate for other brokers or make sales in their own name and on their own behalf they would be considered as violating the obligations they had assumed and be discharged.

The foregoing summarizes the facts as established by the evidence in this case disclosing the nature of the services rendered to the plaintiff by the brokers and the form of remuneration paid such brokers by the plaintiff.

Plaintiff insists that there are three essential elements that must be found before the brokers could be classified as employees. These are as follows:

(1) Wages as remuneration for employment must have been paid to the brokers.

(2) These must have been paid by and from funds belonging to the plaintiff.

(3) The services must have been performed by the broker for the plaintiff as his employee.

It seems to me these facts I have of the relationship existing between the parties, fairly meet each of the tests enumerated.

(1) The remuneration was paid in all instances by the plaintiff to its broker. It is true that it was not denominated wages, nor was it a fixed amount for a given period of time, but it was definite in amount whenever plaintiff realized a commission on the sale of real estate. It was not paid to the broker by the plaintiff un-

til after the plaintiff had collected the commission from its client. It thus became the only remuneration that the broker received for his services and the receipt thereof was in all instances from the plaintiff and not from the client for whom the sale was made.

(2) It was paid by and from funds that belonged to the plaintiff, since all commissions from the sales made by the brokers became the property of the plaintiff. The fact that they were deposited in a separate fund instead of in the profit and loss account of the plaintiff, in no way altered the plaintiff's complete control over such funds. Any failure on the part of a client to account for commissions in a real estate sale gave rise to no claim or cause of action whatever on the part of the broker against such client. The plaintiff alone could institute and maintain such action, because the plaintiff alone was the responsible party at all stages throughout every real estate transaction and had the sole power to make such sale through its licensed brokers, officers, its licensed salesmen, or through the licensed brokers whose earnings are involved in this litigation.

(3) The services of the broker in negotiating the transactions [15] in the name and on behalf of the plaintiff herein were services of a representative and agent, and not as a principal, even though the broker himself may have considered himself an independent contractor.

The first and second elements essential to constitute the employer-employee relationship as stated by the plaintiff, clearly exist in this case, and, when we apply the established facts to the Federal Social Security Statute involved herein, and give application to the regulations and interpretations announced by the Commissioner of Internal Revenue and the various Federal Court decisions, there is little room for doubt that the employer-employee relationship does exist in this case.

The opinion of the Acting Commissioner of Internal Revenue of April, 1943, was based upon a set of facts, (whether they be real or imaginary) that are almost identical with the methods, practices and procedure existing between the plaintiff and its brokers, with the exception that there the agents were referred to as salesmen and here they are designated as brokers. It was held in this ruling that those engaged in making sales under the practice described in the opinion must be classified as employees for the purposes of the taxes imposed by Titles VIII and IX of the Social Security Act, the Federal Insurance Contribution Act and the Federal Employment Tax Act.

I find therefore:

(1) That the brokers received remuneration for services rendered to the plaintiff.

(2) That such remuneration was paid them by and from funds belonging to the plaintiff.

(3) That the services they rendered for which they received compensation were per-

formed for the plaintiff, thus creating the employer-employee relationship as created by the provisions of the Social Security Act.

The plaintiff relies heavily upon a determination of this identical issue made by the Supreme Court of the State of Washington in Henry Broderick, Inc., v. Riley, 22 Wn (2d) 760, where that court, in considering the applicability of the State's Unemployment Compensation [16] Law upon the identical facts herein involved, found that the brokers were independent contractors and that the relationship of employer-employee did not exist. This opinion is by a divided court, and while it is entitled to great weight and consideration, it cannot be controlling on this Court in construing the Federal statute, even though there be a great similarity between the two.

Congress conferred upon the Treasury Department the responsibility of promulgating regulations to make effective the Social Security Laws and also gave them the right to construe such laws in the first instance. The construction given by the Commissioner of Internal Revenue to a hypothetical set of facts which are almost identical to the actual facts involved in this case, determined that the employer-employee relationship existed, rather than that of independent contractor as defined by Regulation 106 of Section 402.204, Treasury Regulations. This Court is bound to accept and follow the Treasury Department's rulings rather than that of a State court of last resort. The decision of this issue

in the State Supreme Court or a court of last resort of any of the States from which decisions have been cited, cannot be taken as precedents in this case. In referring to decisions of courts of last resort of the various states, the Supreme Court of the United States said:

> "Congress no more intended to import this mass of technicality as a controlling 'standard' for uniform national application than to refer decision of the question outright to the local law."
>
> National Labor Relations Board v. Hearst Publications. 322 U. S. 111.

In the Hearst Publications case, supra, the Supreme Court of the United States was construing the National Labor Relations Act, but, in so doing, they announced certain principles that have since been followed in the construction by the Courts of the Social Security Act, and these principles have become the law applicable to the facts in this case.

This Court in Emard v. Squire, 58 F. Supp. 281, gave application to well recognized common law distinctions between the employer- [17] employee and the independent contractor relationship. This was upon the erroneous assumption that the Hearst case, supra, which had been decided some eight months previously, applied only to the National Labor Relations Act. Since this Court wrote that opinion, the Circuit Court of this Circuit, in U. S. v. Aberdeen Aerie of Eagles, 148 F. 2nd 655, adopted the principle and reasoning of the Hearst case as being

applicable to the Social Security Act, in the following language:

> "The case against the Hearst Publications served to shatter the illusion fostered in the past that there is some simple, uniform and easily applicable test which the courts have used, in dealing with problems involving the employer-employee relationship, to determine whether persons doing work for others are employees or independent contractors." * * * "The applicability of the statute is to be judged rather from the purposes that Congress had in mind than from common law rules worked out for determining tort liability * * *."

In the Eagles case, supra, the Court further approves the pronouncement found in U. S. v. Vogue, 145 F. 2d 609, Fourth Circuit, wherein it was said:

> "The purpose of the Act (Social Security) was to provide old age, unemployment and disability insurance for workers in industry. * * * Common law rules as to distinctions between servants and independent contractors throw but little light on the question involved. The Social Security Act, like the Fair Labor Standards Act, and the National Labor Relations Act, was enacted pursuant to a public policy unknown to the common law; * * *"

Thus, we have a statement of law controlling in this Court in reference to determining distinctions between servant and independent contractor. All Federal cases involving the employer-employee re-

lationship, whether they be constructions of the Social Security Act, the National Labor Relations Act, or the Fair Labor Standards Act, become precedents in the instant case.

The most recent expression of the Federal Courts on this question of employer-employee relationship in matters of this nature, construing the Social Security Act, is found in Grace v. McGruder, 148 F. 2d 679, Court of Appeals, District of Columbia, in which the following statement appears: [18]

> "That the common law cases which define employee and independent contractors are not controlling * * *"
>
> "The Social Security Act, like the Fair Labor Standards Act and the National Labor Relations Act were enacted pursuant to public policy unknown to the common law * * *"

The facts as found, when subjected to the interpretations of the Social Security Act by the Commissioner of Internal Revenue and the Federal Courts, support the determination made at the time the taxes herein were levied by the Collector of Internal Revenue, and the judgment, therefore, will be one dismissing the plaintiff's action. Appropriate Findings of Fact and Conclusions of Law and Decree may be submitted upon notice.

Dated this 11th day of December, 1946.

CHARLES H. LEAVY,
United States District Judge.

[Endorsed]: Filed Dec. 11, 1946. [19]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause came on regularly for trial on the 12th day of November, 1946, before the above-entitled court, Honorable Charles H. Leavy presiding therein, sitting without a jury, plaintiff appearing by its attorneys, Eggerman, Rosling & Williams, being represented in court by Donald G. Eggerman, and the defendant appearing by his attorneys, J. Charles Dennis, United States Attorney for the Western District of Washington; Harry Sager, Assistant United States Attorney, and Thomas R. Winter, Special Assistant to the Chief Counsel, Bureau of Internal Revenue, being represented in court by Thomas R. Winter, and witnesses having been sworn and having testified, exhibits introduced in evidence, oral argument made and written briefs filed, the Court having rendered a Memorandum Opinion, and the Court being fully advised, now makes the following

FINDINGS OF FACT

I.

That the plaintiff now is and at all times material herein was a corporation duly organized and existing under and by virtue of the laws of the State of Washington with all license fees last due said State paid. [20]

II.

That the defendant at all times material herein

was, and now is, a resident of Tacoma, Pierce County, Washington, and the duly appointed, qualified and acting Collector of Internal Revenue for the District of Washington with his principal office at Tacoma, Washington.

III.

That this is a suit in three causes of action and arises under the laws of the United States providing for internal revenue, being a suit for the recovery of internal revenue taxes assessed and collected under the Federal Insurance Contributions Act for the period from April 1, 1943, to March 31, 1945, Subchapter A of Chapter 9 of the Internal Revenue Code (26 U.S.C.A., Sections 1400-1432, as amended), and under the Federal Unemployment Tax Act for the years 1943 and 1944, Subchapter C of Chapter 9 of the Internal Revenue Code (26 U.S.C.A., Sections 1600-1611, as amended).

IV.

A written agreement was entered into by the plaintiff with the persons whose remuneration became the subject of the tax herein. This agreement provided that one engaged in selling real estate in connection with the plaintiff's activities in that field must be the holder of a real estate broker's license of the State of Washington, in full force and effect. It also provided that it was the intent of the plaintiff and the persons who signed the agreement that the relationship between them was that of "an independent contractor, and not a servant, employee, joint adventurer or partner." The brokers agreed

to sell real estate for clients of the plaintiff upon a commission basis. Such sales were made of properties listed with the plaintiff and all [21] contractual relationships between the owner of the property and the seller of the property were with the plaintiff herein. The commission received from such activity became the property of the plaintiff. When a transaction was finally consummated and commissions were paid, the plaintiff would divide the proceeds of such commission equally between itself and the individual broker who made the sale. The plaintiff maintained an office properly equipped with furnishings and staff suitable to serving the public as a real estate broker. It was one of the leading and well known real estate brokerage concerns in the City of Seattle enjoying the goodwill of and a reputation for fair dealing with the public. Each broker was supplied with desk room in the plaintiff's office, as well as telephone, switchboard service and reasonable and necessary stenographic services, and the plaintiff in its sole discretion might mention in its advertising the name of the person engaged in selling. All current listings were available to such brokers; the plaintiff, however, reserving the right to place in the temporary possession of any one of them exclusive privileges of sale. Regular sales meetings were attended by both its salaried real estate salesmen and the brokers herein involved, though there was no compulsory requirement that a broker be in attendance. At these meetings discussions were had regarding matters of the business of selling, and assignments of listed prop-

erty were made by the plaintiff. Any broker was free to make a choice of listings but this was subject to such limitations as the plaintiff might impose. Either the plaintiff or its brokers might terminate the relationship existing between them at will, and generally the brokers were given a free hand as to whether they would devote all or part of their time to the services of selling listed real estate for the plaintiff, [22] although on the other hand, if they should undertake to sell real estate for other brokers or make sales in their own name and on their own behalf they would be considered as violating the obligations they had assumed, and be discharged.

V.

Each broker pays his own bond premium for broker's license, license fee, business and occupation taxes, car expenses, insurance, and other expenses incident to the conduct of his services as a real estate broker. The brokers in question do not have any regular time or hours, and work on deals whenever it is convenient to them to do so. They are not required to make any specific calls during the day by plaintiff, and are not required to give their entire time to the business of selling real estate.

VI.

That from the foregoing the Court finds the following ultimate facts:

(1). That wages for remuneration for employment were paid by the plaintiff to the broker salesmen.

(2). That these wages were paid by and from funds belonging to the plaintiff.

(3). That the services were performed by the broker salesmen for the plaintiff as its employees.

VII.

That on or about July 30, 1945, plaintiff was notified that an assessment for additional internal revenue taxes for the period April 1, 1943, to March 31, 1945, was being made on the ground that said broker salesmen were taxable employees of plaintiff under the Federal Insurance Contributions Act and demand was made upon it that the tax liability in the sum of $1,938.63 be paid within ten days thereof. [23] That the said broker salesmen and the amount of said tax applicable to each are set forth in a schedule attached to the complaint, marked Exhibit "B," and which sum was paid by the plaintiff under protest on August 4, 1945.

VIII.

That on or about July 26, 1945, plaintiff was notified that an assessment for additional internal revenue taxes for the period January 1, 1943, to December 31, 1943, and for the period January 1, 1944, to December 31, 1944, was being made on the ground that said broker salesmen were taxable employees of plaintiff under the Federal Unemployment Tax Act and demand was made upon it that the tax liability in the sums of $1,042.00 and $1,380.05, respectively, be paid within ten days thereof. That the said broker salesmen and the

amount of said taxes applicable to each are set forth in a schedule attached to the complaint, marked Exhibit "B," and which sums were paid by the plaintiff under protest on August 4, 1945.

IX.

That on or about August 11, 1945, plaintiff duly filed with the defendant, Collector of Internal Revenue for the District of Washington, for consideration of the Commissioner of Internal Revenue for its claims for refund Nos. 481,703, 814,304 and 814,305.

X.

That under date of January 2, 1946, the Commissioner of Internal Revenue notified plaintiff that its claims for refund were disallowed.

XI.

That this action was timely brought on or about February 13, 1946. [24]

From the foregoing Findings of Fact the Court makes the following

CONCLUSIONS OF LAW

I.

That the relationship existing between plaintiff's broker salesmen and the plaintiff for all times material herein is that of employee and employer within the meaning of the Federal Insurance Contributions Act, Subchapter A of Chapter 9 of the Internal Revenue Code (26 U.S.C.A., Sections 1400-1432,

as amended), and within the meaning of the Federal Unemployment Tax Act, Subchapter C of Chapter 9 of the Internal Revenue Code (26 U.S.C.A., Sections 1600-1611, as amended).

II.

That the taxes assessed and collected were in all respects legal and in strict accordance with the law.

III.

That judgment should be entered dismissing plaintiff's complaint and with costs to be taxed against the plaintiff in the sum of $10.00.

Dated this 27th day of January, 1947.

/s/ CHARLES H. LEAVY,
United States District Judge.

Presented at entry thereof and excepted thereto.
/s/ JOSEPH J. LANZA,
Of Counsel for Plaintiff.

Presented by:
/s/ THOMAS R. WINTER,
Spec. Asst. to the Chief Counsel.

[Endorsed]: Filed Jan. 22, 1947. [25]

In the District Court of the United States for the Western District of Washington, Southern Division

Civil No. 832

HENRY BRODERICK, INC.,

Plaintiff,

vs.

CLARK SQUIRE, Individually and as Collector of Internal Revenue for the District of Washington,

Defendant.

JUDGMENT

The above-entitled cause came on regularly for trial on the 12th day of November, 1946, before the above-entitled court, Honorable Charles H. Leavy presiding therein, sitting without a jury, plaintiff appearing by its attorneys, Eggerman, Rosling & Williams, being represented in court by Donald G. Eggerman, and the defendant appearing by his attorneys, J. Charles Dennis, United States Attorney for the Western District of Washington; Harry Sager, Assistant United States Attorney, and Thomas R. Winter, Special Assistant to the Chief Counsel, Bureau of Internal Revenue, being represented in court by Thomas R. Winter, and witnesses having been sworn and having testified, exhibits introduced in evidence, oral argument made

and written briefs filed, the Court having rendered a Memorandum Opinion, and the Court having made and entered its Findings of Fact and Conclusions of Law herein, now, therefore, it is hereby

Ordered, Adjudged and Decreed that the plaintiff's complaint be, and the same is, hereby dismissed with [26] prejudice, with costs in the sum of $10.00 taxed against the plaintiff.

Dated this 27th day of January, 1947.

/s/ CHARLES H. LEAVY,
United States District Judge.

Present at entry thereof and excepted thereto.
/s/ JOSEPH J. LANZA,
Of Counsel for Plaintiff.

Presented by:
/s/ THOMAS R. WINTER.

[Endorsed]: Filed Jan. 27, 1947. [27]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO CIRCUIT COURT OF APPEALS

Notice Is Hereby Given that Henry Broderick, Inc., a corporation, Plaintiff above-named, hereby appeals to the Circuit Court of Appeals for the

Ninth Circuit, from the final jud
this action on January 27, 1947.

D. G. EGGERM
JOSEPH J. LA
EGGERMAN, F
WILLIAMS,
Attorneys fo

Received a copy of the within no
of March, 1947.

J. CHARLES I
U. S. Attor
Defendant

Copy of the above Notice of
Thos. R. Winter, Attorney for U.
nue Bureau, Smith Tower, Seattl
the 17th day of March, 1947.

E. E. REDBAY
Deputy Cler

[Endorsed]: Filed March 17,

[Title of District Court and Caus

in the State of Washington, as surety, are hel
firmly bound unto Clark Squire, individuall
as Collector of Internal Revenue for the Distr
Washington, Defendant in the above-entitled
in the sum of Two Hundred Fifty Dollars ($25

Sealed with our seals and dated this 28th d
February, 1947.

The Condition of this Obligation is Such, t

Whereas, the District Court of the United S
for the Western District of Washington, Sou
Division, on the 27th day of January, 1947, i
above-entitled action, entered its judgment
missing Plaintiff's complaint with prejudice,
with costs in the sum of $10.00 taxed against I
tiff, and

Whereas, the above-named principal has h
fore given due and proper notice that it ap
from said judgment to the United States C
Court of Appeals for the Ninth Circuit;

Now Therefore, if the said principal, H
Broderick, Inc., shall pay [29] all costs that
be awarded against it if the appeal is dismiss
the judgment affirmed, or all such costs as the a
late court may award if the judgment is mod
then this obligation to be void; otherwise to re

State of Washington,
County of King—ss.

On the 28th day of February, 1947, before me personally appeared Gerry L. White, to me known to be the Attorney-in-Fact of the corporation that executed the within and foregoing instrument, as surety, and acknowledged the said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that he was authorized to execute said instrument and that the seal affixed is the corporate seal of said corporation.

In Witness Whereof I have hereunto set my hand and affixed my official seal the day and year first above written.

[Seal] R. E. EICKMAN,
Notary Public in and for the State of Washington, residing at Seattle.

State of Washington,
County of King—ss.

On the 28th day of February, 1947, before me personally appeared Joseph J. Lanza, to me known to be one of the attorneys for and on behalf of said Henry Broderick, Inc., a corporation, that executed the within and foregoing instrument as principal, and acknowledged the said instrument to be the free and voluntary act and deed of said corporation and association for the uses and purposes therein mentioned and on oath stated that he was authorized to execute said instrument.

In Witness Whereof I have hereunto set my hand and official seal the day and year first above written.

[Seal] KATHRYN BRYAN,
Notary Public in and for the State of Washington, residing at Seattle.

[Endorsed]: Filed March 17, 1947. [30]

[Title of District Court and Cause.]

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY ON APPEAL

The following is a statement of points on which Appellant intends to rely on appeal:

1. That there is no substantial evidence in the record to support the finding of the District Court that wages for remuneration for employment were paid by the Plaintiff to the broker-salesmen.

2. That there is no substantial evidence in the record to support the finding of the District Court that these wages were paid by and from funds belonging to the Plaintiff.

3. That there is no substantial evidence in the record to support the finding of the District Court that the services were performed by the broker-salesmen for the Plaintiff as its employees.

4. That the District Court erred in concluding that the relationship existing between Plaintiff's broker-salesmen and the Plaintiff was that of em-

ployee and employer within the meaning of the Federal Insurance Contributions Act, and within the meaning of the Federal Unemployment Tax Act.

5. That the District Court erred in concluding that the taxes assessed and collected were in all respects legal and in strict accord with the law.

6. That the District Court erred in entering its judgment dismissing [31] Plaintiff's complaint.

Dated this 14th day of March, 1947.

D. G. EGGERMAN,
JOSEPH J. LANZA,
EGGERMAN, ROSLING & WILLIAMS,
Attorneys for Appellant
Henry Broderick, Inc.

Received a copy of the within Statement this 14th day of March, 1947.

J. CHARLES DENNIS,
U. S. Attorney, Attorney for Defendant.

[Endorsed]: Filed March 17, 1947. [32]

[Title of District Court and Cause.]

PLAINTIFF'S AMENDED DESIGNATION OF RECORD, PROCEEDINGS, AND EVIDENCE TO BE CONTAINED IN THE RECORD ON APPEAL

Comes now the Plaintiff above-named, and pursuant to Rule 75 of the Rules of Civil Procedure

pertaining to record on appeal to the Circuit Court of Appeals, herewith designates the following portions of the record, proceedings and evidence to be contained in the record on appeal:

1. Complaint and Exhibit "B" thereto attached.
2. Answer.
3. Court's Memorandum Opinion.
4. Findings of Fact and Conclusions of Law.
5. Judgment.
6. Reporter's transcript of the evidence, two copies of which are being filed herewith.
7. Stipulation and order correcting exhibit number.
8. Plaintiff's Exhibit 1 and Defendant's Exhibits A-1 to A-7 inclusive.
9. Notice of Appeal to Circuit Court of Appeals.
10. Cost bond on appeal.
11. Plaintiff's amended designation of contents of record on appeal.
12. Statement of points on which Appellant intends to rely on appeal. [33]
13. Certificate of Clerk to transcript of record on appeal.

Dated this 20th day of March, 1947.

D. G. EGGERMAN,
JOSEPH J. LANZA,
EGGERMAN, ROSLING & WILLIAMS,
Attorneys for Plaintiff.

Received a copy of the within designation this 21st day of March, 1947.

THOMAS R. WINTER,
Of Attorneys for Defendant.

[Endorsed]: Filed March 24, 1947. [34]

[Title of District Court and Cause.]

STIPULATION AND ORDER CORRECTING EXHIBIT NUMBER

It is hereby stipulated between the parties hereto through their respective attorneys of record that the exhibit number of three business cards of Melville Wilson, M. Ross Downs and Fred J. O'Brien, which were marked by the clerk as "Plf's No. 2" be corrected to read "Def's No. A-7" and that said exhibit as so corrected will be considered as having been admitted in this cause as defendant's exhibit No. A-7.

/s/ JOSEPH J. LANZA,
Of Attorneys for Plaintiff.

/s/ THOMAS R. WINTER,
Of Attorneys for Defendant.

ORDER

Upon the foregoing stipulation,

It Is Ordered that the Clerk is hereby directed to correct the identification marking of said exhibit

from "Plf's No. 2" to "Def's No. A-7" and that said exhibit so corrected is to be considered as having been admitted in this cause as Defendant's exhibit No. A-7.

/s/ CHARLES H. LEAVY,
U. S. District Judge.

Presented by:

HARRY SAGER,
Of Attorneys for Defendant.

[Endorsed]: Filed March 24, 1947. [35]

[Title of District Court and Cause.]

DEFENDANT'S DESIGNATION OF ADDITIONAL PORTION OF RECORD AND PROCEEDINGS TO BE CONTAINED IN THE RECORD ON APPEAL

Comes now the defendant above-named, and pursuant to Rule 75 of the Rules of Civil Procedure pertaining to Record on Appeal to the Circuit Court of Appeals, herewith designates the following additional portion of the record and proceedings to be contained in the record on appeal:

1. The reporter's transcript of the statement of the Court with respect to the testimony of plaintiff's

witness, Melville Wilson, two cop
being filed herewith.

Dated this 25th day of March, 1

/s/ J. CHARLES D
United State

/s/ HARRY SAGE
Assistant Un
Attorney

/s/ THOMAS R. W
Special Assistant to the Chief Co
Internal Revenue. Attorneys

Received a copy of the within
25th day of March, 1947.

JOSEPH J. LA
Of Attorneys

[Endorsed]: Filed Mar. 29, 19

"The Court: * * *
* * * * *

"There are certain facts in dis
connection I might say that I can

tions that they were furnishing here, and then hav
him go out on his own and transact the business
feel that other firms without at least the contra
that apparently the officers of the corporation sta
was made."

* * * * * *

[Endorsed]: Filed Mar. 29, 1947. [37]

No. 832

PLAINTIFF'S EXHIBIT No. 1

Agreement

Henry Broderick Inc., hereinafter designated
"First Party", and.....hereinaft
designated as "Second Party", in consideration
the mutual covenants and promises herein co
tained, agree as follows:

(1) First and Second Parties respectively wa
rant that they are licensed and authorized to act
real estate brokers in the State of Washington, a
each agrees during the term hereof at his own e
pense to keep his license as broker in full force a

(2) It is agreed that First Party is duly qualified to and does procure the listing of real estate for sale, lease or rental, and prospective purchasers, lessees and renters therefor, and has and enjoys the good-will of and a reputation for fair dealing with the public, and also has and maintains an office, properly equipped with furnishings and staff, suitable to serving the public as a real estate broker, and the parties hereto deem it to be to their mutual advantage to form the association hereinafter agreed to.

(3) First Party agrees to furnish Second Party a desk, with use of a telephone, at First Party's offices, now located at Second and Cherry Streets, Seattle, Washington, and to furnish switchboard service, including taking of calls for Second Party pertaining to the services referred to herein. First party will also furnish Second Party with such reasonable and necessary stenographic service as may be required for carrying out Second Party's portion of this agreement. It is understood that First Party advertises extensively and that Second Party will, at First Party's sole discretion, be mentioned in said advertising.

(4) First Party agrees to make available to Second Party all current listings of the office, except such as First Party may find expedient to place exclusively in the temporary possession of some other broker, and First Party agrees to assist Second Party in his work by advice and full co-operation in every way practicable. First Party has

within its organization experts in various fields pertaining to real estate, and Second Party will have the benefit of the advice and co-operation of such experts in connection with deals being handled by Second Party.

(5) Second Party agrees to work diligently and to exert his best efforts to sell, lease, or rent any and all real estate listed with First Party and available to Second Party under the terms of Paragraph (4) above, to solicit additional listings and customers in the name of First Party, and otherwise to promote the business of serving the public in real estate transactions to the end that each of the parties hereto may derive the greatest profit possible.

(6) The usual and customary commission shall be charged for any service performed hereunder unless First Party shall advise Second Party of any special contract relating to any particular transaction which he undertakes to handle. When Second Party shall perform any service hereunder whereby a commission is earned, said commission shall, when collected, be divided between First Party and Second Party and First Party shall receive 50 per cent, and Second Party 50 per cent, of the commissions realized by them on deals in which Second Party has participated, division of the commission to be made on that basis as the commission is received. Such division shall apply also to fees on appraisals. In the event of special arrangements with any client, or in the event property of First Party is listed, a special rate of commission may apply, such rate to

be agreed upon by First Party and Second Party. In no case shall First Party be liable to Second Party for any commission unless the same shall have been collected from the party for whom the service was performed. [38]

(7) First Party shall not be liable to Second Party for any expense incurred by the latter, or for any of the latter's acts or omissions, nor shall Second Party be liable to First Party for office help or expense insofar as First Party has heretofore agreed to provide the same, and Second Party shall have no authority to bind First Party by any promise or representation, unless specifically authorized in a particular transaction; but expenses for attorney's fees, costs, revenue stamps, abstracts and the like which must, by reason of some necessity, be paid from the commission, or which are incurred in the collection of, or the attempt to collect, the commission shall be paid by the parties in the same proportion as provided for herein in the division of commissions. First Party shall be under no obligation to Second Party to make any advances either for expenses or commissions. Second Party agrees to furnish transportation at his own expense for prospects which Second Party under this agreement contacts, and to pay at his own expense entertainment costs, club dues, and other expenses incident to the conduct of his services as a real estate broker.

(8) For orderly conduct of the business, First Party reserves the right to assign particular pros-

pects of the office to a broker or brokers associated with First Party and such broker or brokers shall have the exclusive right, together with First Party, to contact such prospect so long as such assignment is in effect and Second Party agrees not to interfere with such assignments to other brokers or with First Party and other brokers in handling the same. Second Party shall have entire discretion as to the handling of "leads" and prospects assigned to him and as to the conduct of Second Party's services as broker hereunder, and as to the means of securing listings, handling prospects, and consummating deals, and shall be free from control of First Party as to the manner and method of conducting Second Party's services as real estate broker, it being the intent that Second Party is an independent contractor, and not a servant, employee, joint adventurer or partner of First Party.

(9) This agreement and the association created hereby may be terminated by either party hereto at any time upon notice given to the other.

Dated this ..... day of ....., 19.....

HENRY BRODERICK INC.,

By .....
First Party

.....
Second Party [39]

Admitted: Nov. 12, 1946. [39]

No. 832
Defendant Exhibit
dm. Nov. 12, 1946 A-1

AUTHORITY TO SELL REAL ESTATE

Seattle, Washington, _____ 19____

FOR VALUABLE CONSIDERATION, and in further consideration of services rendered and to be rendered by Henry Broderick Inc., a Corporation, in negotiating for a sale of the property described on the reverse side hereof, the undersigned owner___ of said real property hereby grant___ to said Henry Broderick Inc. the exclusive right, for a period of _____ days, ending _____ 19____ to sell and enter into a contract for the sale of said property, purchase price to be $_____ terms of payment to be as follows: $_____ Cash; balance of $_____ payable as follows: _____

Owner___ represent___ that___ _____ ha___ a good and marketable title to said real property and _____ agree___ upon the payment of earnest money deposit on the sale of said property, to furnish a title insurance policy, showing the said property to be free and clear of all encumbrances, excepting such as may be assumed by the purchaser (at purchaser's option) as a part of the aforesaid purchase price.

Rents, taxes, insurance and interest on encumbrances, if any, are to be adjusted as of date deed or contract is delivered. Said owner___ further agree ___ that ___ _____ will convey title to said property by statutory warranty deed to a purchaser to be indicated by Henry Broderick Inc., on the payment of purchase price as herein specified. Said owner___ hereby agree___ that in the event of a sale of said property by Henry Broderick Inc., or if Henry Broderick Inc. shall produce a purchaser ready, able and willing to purchase said real property on the terms above specified, during the life of this contract, or if the undersigned owner___ fail___ to perform any of the terms of this contract _____ _____ will pay a commission of 5% of the purchase price. Time is of the essence of this agreement.

Henry Broderick INC

40

"An Office That Knows Its Subject"

Main 4350

District _____ LIST NO. _____
Address _____ PR_____
Owner _____ NO. ROOMS _____
Addition _____ AGE _____
Lot _____ Block _____ Size _____ ERECT SIGN _____
Style Construction _____ KEY AT _____

Bsmt. Rec. Rm. _____ Maid's Rm. _____ Bath _____
Bed Rms.: 1st Flr. _____ 2nd Flr. _____ 3rd Flr. _____
Baths: 1st Flr. _____ 2nd Flr. _____ Lav.: 1st Flr. _____
Heat _____ Oil Bur. _____ Elec. Refrig. _____
Floors _____ Garage: 1 car _____ 2 car _____ Bkfst. Rm. _____
Condition _____ Finish _____ Taxes _____
1st Mortgage, $ _____ Rate _____ Held by _____
Due _____ Reductions _____
Contract Bal. _____ Payable _____
Owner's Address _____ Phone, Res. _____
Listed by _____ Date _____ Phone, Bus. _____
REASON FOR SELLING _____ Appraisal _____

		Baths	Beds	
				$

Defendant Exhibit A-2
Dn. Nov. 12, 46

AUTHORITY TO SELL REAL ESTATE

Seattle, Washington, ... 19

FOR VALUABLE CONSIDERATION, and in further consideration of services rendered and to be rendered by Henry Broderick Inc., a Corporation, in negotiating for a sale of the property described on the reverse side hereof, the undersigned owner.... of said real property hereby grant.. to said Henry Broderick Inc., the exclusive right, for a period of ..... days, ending ..... 19 ..... to sell and enter into a contract for the sale of said property, purchase price to be $ ..... terms of payment to be as follows: $ ..... Cash; balance of $ ..... payable as follows: .....

Owner.... represent.. that ..... ha.... a good and marketable title to said real property and ..... agree.. upon the payment of earnest money deposit on the sale of said property, to furnish a title insurance policy, showing the said property to be free and clear of all encumbrances, excepting such as may be assumed by the purchaser (at purchaser's option) as a part of the aforesaid purchase price.

Rents, taxes, insurance and interest on encumbrances, if any, are to be adjusted as of date deed or contract is delivered. Said owner.... further agree.. that..... .....will convey title to said property by statutory warranty deed to a purchaser to be indicated by Henry Broderick Inc., on the payment of purchase price as herein specified. Said owner.. hereby agree.. that in the event of a sale of said property by Henry Broderick Inc., or if Henry Broderick Inc. shall produce a purchaser ready, able and willing to purchase said real property on the terms above specified, during the life of this contract, or if the undersigned owner.... fail.... to perform any of the terms of this contract ..... will pay a commission of 10% of the purchase price. Time is of the essence of this agreement.

Henry Broderick INC.

"An Office That Knows Its Subject"

Main 4350

District..... LIST NO .....
Address..... PRICE.. .....
Owner..... NO. ROOMS.....
Addition..... AGE.....
Lot.....Block.....Size..... ERECT SIGN.....
Style Construction..... KEY AT.....

Bed Rms.: 1st Flr.....2nd Flr.....3rd Flr.....
Baths: 1st Flr.....2nd Flr.....Lav.: 1st Flr.....
Heat.....Oil Bur.....Elec. Refrig.....
Floors.....Garage: 1 car.....2 car.....Bkfst. Rm.....
Condition.....Finish.....Taxes.....
1st Mortgage, $.....Rate.....Held by.....
Due.....Reductions.....
Contract Bal.....Payable.....
Owner's Address.....Phone, Res.....
Listed by.....Date.....Phone, Bus.....
REASON FOR SELLING.....Appraisal.....
WILL TRADE FOR.....

No.		BATHS	BEDS	$

DEFENDANT'S EXHIBIT A-3

Henry Broderick, Inc. No. 832

Date.....

List No. .....Price.....

District .....

Address .....

Owner .....

Res. Phone .....Bus. .....

Bus. Address .....

No. Rooms .....Age .....

Style Construction .....

Size Lot .....Developed.....

Occ. by .....

Key at .....

Condition .....

Basement Rec. Rm.....Maid Rm.....Bath.....

Ex. Rooms 1st.....Bath.....

Bed Rooms 2nd.....Baths.....

3rd Floor .....Baths.....

Garage .....Floors.....

Heat ..... Oil Bur.....

Int. Finish .....

Taxes .....If Paid.....

1st Mtg. .....Rate.....

Reductions .....

Mortgagee .....

Can we erect sign? .....

Listed by .....

Appraisal .....

Reason for sale .....

Comments .....

Admitted Nov. 12, 1946.

DEFENDANT'S EXHIBIT A-4

Henry Broderick, Inc. No. 832

Exclusive Listing

From ..... To .....

Price .....

District .....

Address .....

Owner .....

Res. Phone ..... Bus. .....

Bus. Address .....

No. Rooms ..... Age .....

Style Construction .....

Size Lot ..... Developed .....

Occ. by .....

Key at .....

Condition .....

Basement Rec. Rm. ..... Maid Rm. ..... Bath .....

Ex. Rooms 1st ..... Bath .....

Bed Rooms 2nd ..... Baths .....

3rd Floor ..... Baths .....

Garage ..... Floors .....

Heat ..... Oil Bur. .....

Int. Finish .....

Taxes ..... If Paid .....

1st Mtg. ..... Rate .....

Reductions .....

Mortgagee .....

Can we erect sign? .....

Listed by .....

Appraisal .....

Reason for sale .....

Comments .....

Admitted Nov. 12, 1946. [43]

DEFENDANT'S EXHIBIT A-5

Earnest Money Receipt

Henry Broderick, Inc.
No. 832
Seattle, Washington,..... 19..

Received from.....(hereinafter called "purchaser").....Dollars ($.....) as earnest money in part payment of the purchase price of the following described real estate in King County, Washington:

Total purchase price is.....Dollars ($.....), payable as follows:

Owner shall furnish purchaser, as soon as procurable and within.....days of date of acceptance of this offer, purchaser's policy of title insurance or title report evidencing condition of title.

If title is not insurable and cannot be made insurable within.....days from date of title report, earnest money shall be refunded and all rights of purchaser terminated, except that purchaser may waive defects and elect to purchase. But if title is good and purchaser neglects or refuses to complete purchase, the seller shall forfeit the earnest money as liquidated damages which shall be the exclusive remedy of the seller under this contract. The agent shall not be responsible for delivery of title.

The property is to be conveyed by.....deed, free of encumbrances except

Rights reserved in federal patents or state deeds, building or use restrictions general to the district, and building or zoning regulations and provisions shall not be deemed encumbrances.

Encumbrances to be discharged by owner may be paid out of purchase money at date of closing.

194.... general taxes shall be adjusted on pro rata calendar basis, seller to pay for period from January 1st, 194.... to date of closing, purchaser from date of closing to December 31st, 194.....

Rents, insurance, interest and water shall be prorated as of date of closing.

Possession .....

Purchaser offers to purchase the property on the terms noted and this agreement is issued subject to the approval of the owner thereof within..... days from date. Purchaser agrees not to withdraw this offer during said period or until earlier rejection thereof by owner. Purchaser agrees that written notice of acceptance, given to agent by owner, shall be notice to purchaser.

The sale shall be closed in office of agent within .....days after title insurance policy or title insurance company's report is furnished by owner.

There are no verbal or other agreements which modify or affect this contract.

Time is of the essence of this contract.

.....

Seller.

.....

Seller (wife or husband).

.....

Agent.

.....

Purchaser.

.....

Purchaser (wife or husband)

A citizen or one who has in good faith declared his intention to become a citizen of the United States.

.....

Address and Phone.

Seattle, Washington,....., 194....

I Hereby Agree to the above sale and to all the foregoing terms and conditions and agree to pay Henry Broderick, Inc., agent, when the sale is concluded, commission of $..... for services.

In the event that the deposit is forfeited, I agree to pay one-half of the amount forfeited to said agent.

Address .....

Phone .....

.....

Owner.

.....

Wife. [44]

Earnest Money Receipt

From .....

To .....

Date .....

Property .....

Closed

Date .....

Remarks .....

HENRY BRODERICK, INC.,
Second and Cherry
MAin 4350. [45]

[Earnest Money Receipt identical with Earnest Money Contract except the word "Receipt" appears instead of "Contract" in the two headings.]

DEFENDANT'S EXHIBIT A-6
No. 832

Authority to Sell Real Estate

Seattle, Washington, ..., 19....

For Valuable Consideration, and in further consideration of services rendered and to be rendered by Henry Broderick, Inc., a Corporation, in negotiating for a sale of the following described real estate situated in Seattle, King County, State of Washington, to-wit: .....

the undersigned owner.... of said real property hereby grant.... to said Henry Broderick, Inc., the exclusive right, for a period of.....days, ending ....., 19...., to negotiate a contract for the sale of said property, purchase price to be .....Dollars; terms of payment to be as follows: $.....Cash; balance of $..... to be evidenced by: .....

Owner.... represent.... that ..... ha..... a good and marketable title to said real property and..... agree.... upon the payment of earnest money deposit on the sale of said property, to furnish a purchaser's policy of title insurance insuring the said property to be free and clear of all encumbrances, excepting such as may be assumed by the purchaser (at purchaser's option, as a part of the aforesaid purchase price.

Taxes for the current year, rents, water, insurance and interest on encumbrances, if any, are to be adjusted as of date deed or contract is delivered.

Said owner.... further agree.... that ..... will convey title to said property by statutory warranty deed to a purchaser to be indicated by Henry Broderick Inc. on the payment of purchase price as herein specified.

Said owner.... hereby agree.... that in the event of a sale of said property by Henry Broderick Inc. or if Henry Broderick Inc. shall produce a purchaser ready, able and willing to purchase said real property on the terms above specified, or if the undersigned owner.... fail.... to perform any of the terms of this contract.....will pay a commission of 5% on the first $60,000.00 of the purchase price, and 2½% on the balance of the purchase price.

Time is the essence of this agreement.

.....

"An Office that Knows Its Subject"

Henry Broderick Inc.
Second and Cherry—MAin 4350
Seattle 4, Washington

Admitted Nov. 12, 1946. [48]

No. 1832
Deft's Exhibit A-7
Adm. Nov. 12, 1946

MELVILLE WILSON

BUSINESS PROPERTIES
Henry Broderick INC.

MAIN 4350
SECOND AND CHERRY
SEATTLE

FRED J. O'BRIEN

SECRETARY
Henry Broderick INC.

MAIN 4350
SECOND AND CHERRY
SEATTLE

M. ROSS DOWNS

ASSOCIATE BROKER
Henry Broderick INC.

MAIN 4350
SECOND AND CHERRY
SEATTLE

(Per Order dated March 24, 1947 identification of exhibit heretofore marked as Pltf's #2, corrected and marked as Deft's Exh. A-7)

In the United States District Court for the Western District of Washington

Southern Division

No. 832

BRODERICK, INC.,

Plaintiff,

vs.

CLARK SQUIRE, individually and as Collector of Internal Revenue for the District of Washington,

Defendant.

CLERK'S CERTIFICATE TO THE TRANSCRIPT OF THE RECORD ON APPEAL

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify and return that the foregoing transcript, consisting of pages numbered 1 to 49, inclusive, together with the original Transcript of Proceedings, consisting of pages numbered 1 to 114, inclusive, is a full, true and correct record of so much of the papers and proceedings in Cause No. 832, Henry Broderick, Inc., Plaintiff-Appellant, vs. Clark Squire, individually and as Collector of Internal Revenue for the District of Washington, Defendant-Appellee, as required by Plaintiff's Amended Designation of the Contents of the Record on Appeal and Defendant's Designation of Additional Contents of the Record on Appeal, on file

and of record in my office at Tacoma, Washington, and the same constitutes the Transcript of the Record on Appeal from the Judgment of the District Court of the United States, Western District of Washington, Southern Division, to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the original Reporter's Transcript of Proceedings, consisting of pages numbered 1 to 114, inclusive, is herewith transmitted to the Circuit Court of Appeals.

I further certify that the following is a full, true and correct statement of all expenses, fees and charges earned by me in the preparation and certification of the aforesaid Transcript of the Record on Appeal, to-wit:

Appeal fee	$ 5.00
Clerk's fee for preparing, comparing and certifying record on appeal	10.40
	$15.40

and I further certify that the said fees, as above set out, have been paid in full.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said Court, in the City of Tacoma, in the Western District of Washington, this 19th day of April, 1947.

[Seal] MILLARD P. THOMAS,
Clerk.

By /s/ E. E. REDMAYNE,
Deputy.

In the District Court of the United States for the Western District of Washington
Southern Division

No. 832

HENRY BRODERICK, INC.,

Plaintiff,

vs.

CLARK SQUIRE, individually and as Collector of Internal Revenue for the District of Washington,

Defendant.

TRANSCRIPT OF PROCEEDINGS

Be It Remembered that on the 12th day of November, 1946, at the hour of 10:00 o'clock a. m., the above entitled and numbered cause came on for trial before the Honorable Charles H. Leavy, one of the judges of the above entitled court, sitting in the District Court of the United States at Tacoma, Pierce County, Washington; the Plaintiff appearing by Messrs. Eggerman, Rosling & Williams (by Mr. Eggerman), and the Defendant appearing by J. Charles Dennis, United States Attorney, Harry Sager, Assistant United States Attorney, and Thomas R. Winter, Special Assistant to Chief Counsel (by Mr. Winter).

Whereupon, the following proceedings were had and done, to-wit: [2*]

(Whereupon opening statement was made by Mr. Eggerman.)

Mr. Eggerman: If the Court please, I have shown the Corporation License receipt to Counsel for the defendant, showing that the plaintiff is licensed under the State till June 30, 1947, and he admits that that is the fact, so that's no issue.

The Court: Very well. [14]

LLOYD T. BAIRD,

produced as a witness on behalf of the plaintiff, after being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Eggerman:

Q. State your name to the Court, Mr. Baird?

A. Lloyd T. Baird.

Q. And do you reside in Seattle?

A. I do.

Q. What is your official connection, if any, with the plaintiff firm? A. I am Vice President.

Q. How long have you been Vice President?

A. About five years.

Q. And how long have you been connected with the firm?

A. A little more than nineteen years.

Q. By the way, Mr. Henry Broderick is the President, is he not? A. That's correct.

Q. And is it not a fact that about ten days ago he was suddenly stricken and taken to the hospital?

A. Yes, sir.

(Testimony of Lloyd T. Baird.)

Q. Where he is still confined?

A. He is still in the hospital, yes, sir.

Q. And he is unavailable today? [15]

A. That's correct.

Q. In what business is the plaintiff firm engaged?

A. Real estate, property management and insurance.

Q. How long has the plaintiff been in existence as a Corporation? And engaged——

A. Since 1911. Pardon?

Q. And engaged in that business?

A. Since 1911.

Q. Tell us whether or not the plaintiff is licensed as a broker under the laws of the State of Washington? A. It is.

Q. A Real Estate broker, I should say?

A. It is.

Q. Now, can you outline in a little more detail, your duties?

A. Well, in addition to the usual duties of a Vice President, which has to do with general supervision of the office, under the President, having been Manager of the Property Management department for so many years, the larger part of my attention is directed toward the Property Management department.

Q. And as such, what are your duties with reference to giving instructions to employees?

A. Mr. Foster is the General Rental Manager, over who I am, and through him instructions are given to the employees. [16]

(Testimony of Lloyd T. Baird.)

Q. How many real estate salesmen employees does the plaintiff employ?

A. We have eleven or twelve.

Q. And do they also carry licenses?

A. They do.

Q. Real estate licenses? A. Yes, sir.

Q. What kind of licenses do they carry?

A. Salesmen's licenses.

Q. And is there a bond furnished by these salesmen to the State of Washington?

A. There is a bond furnished to the State of Washington.

Q. And who pays the cost of that?

A. The firm.

Q. And who pays the expense of procuring their licenses—who pays the premiums on their bonds?

A. The firm, also.

Q. Now, by that you mean the plaintiff?

A. That's right.

Q. Tell us whether or not there are sales meetings conducted in the plaintiff's office, attended by these salesmen employees? A. There are.

Q. How regularly and how frequently?

A. Every business morning. [17]

Q. Tell us whether it is optional or compulsory upon the salesmen employees to attend those meetings? A. Compulsory.

Q. Who presides at those meetings?

A. Mr. Foster, the rental manager.

Q. And what, in general, is done at those meetings?

(Testimony of Lloyd T. Baird.)

A. The salesmen report on the assignments that they have been given for the day before, the activities of the day before, and generally give a report to Mr. Foster of all they have done the day previous. Also assignments are given to the salesmen, by the head of the department, for the ensuing day.

Q. Will you tell us, what, if any——

Mr. Winter: Mr. Eggerman, are those contracts with the salesmen in writing, or——

Mr. Eggerman: No, we have no contracts in writing with the salesmen. How far had I gone in my question, Mr. Reporter?

The Reporter (reading): "Will you tell us what, if any——"

Q. Will you tell us what, if any, supervision or control is exercised by the plaintiff over these salesmen employees?

A. They have complete supervision as they would over any employee, clerk or otherwise. [18]

Q. Are they required to keep regular hours?

A. They are.

Q. Just what are those hours?

A. The office opens at 8:30 in the morning and the closing hour is 5 in the evening.

Q. Now, when any work is assigned to them, what, if any requirement is there that they make prompt reports of what they have done on the assignment?

A. They are required to make a prompt report.

Q. Now, with reference to these salesmen employees, do they devote, or are they permitted to

(Testimony of Lloyd T. Baird.)

devote any portion of their time to efforts to make sales of real estate?

A. They are employed on a basis which requires that they give all of the time necessary to Property Management account, under their particular charge. They are allowed, in addition to that, if they have fulfilled their duties in regard to the office Property Management account, to make sales, and, also, I might say, to make leases, that is property management leases.

Q. What percentage of their time has been devoted to those assignments, making sales and making leases?

A. Approximately twenty-five per cent.

Q. Now, with reference to their sales or lease activities, what directions if any, or controls if any, is exercised by [19] them with reference to specific assignments? A. Entire control.

Q. Who gives them the assignments and tells them what sales to attend to; or leases to attend to?

A. Mr. Foster.

Q. Now, when they are given a prospect, what instructions do they receive with respect to seeing that prospect, and making a report?

A. They are instructed to see the prospect and report back to the head of the department as to what transpired.

Q. What is the basis of compensation to these salesmen employees?

A. They have a regular stipulated salary.

Q. And how often is that paid?

A. That's paid twice a month.

(Testimony of Lloyd T. Baird.)

Q. Now, if they should be—or any of them should be successful in making a sale, or a lease on which a commission comes to the firm, do they receive any compensation therefrom, for that?

A. They do.

Q. And what is that?

A. It's about—equivalent to about forty per cent of the commission earned by the office.

Q. And when is that paid to them?

A. That is paid on the regular salary day.

Q. So that if they were responsible for a commission earned [20] by Henry Broderick, Inc., on the 2nd of the month, they wouldn't receive the bonus until when?

A. Till the fourteenth, or fifteenth.

Q. And in the meantime, when that comp—when that commission was paid, where did it go—where would it go?

A. It goes into Henry Broderick, Inc., profit and loss account.

Q. Now are these salesmen employees required to pay any part of the sales expense in endeavoring to make sales or leases? A. They are not.

Q. Who pays that? A. The firm.

Q. Now, if they are unable to effect a sale, does that affect their salary in any way?

A. It doesn't.

Q. Mr. Baird, I now hand you——

The Court: Hand the exhibits to the Bailiff, and the Bailiff will hand them to the witness.

Q. You have before you a document marked Exhibit 1. Tell the Court what that is?

(Testimony of Lloyd T. Baird.)

A. That's an agreement between Henry Broderick, Inc., as Brokers. [21]

Q. Is that a specimen, a blank?

A. This is a blank specimen.

Q. Are you familiar with that form?

The Court: If you will just let the Bailiff——

Mr. Eggerman: I beg your pardon, I am so used to the Superior Court procedure.

Q. You are familiar with this form, are you?

A. I am, yes, sir.

Q. With what associates is this form used?

A. Brokers.

Q. And the brokers that are associated with Henry Broderick, Inc., tell us whether those now associated have all signed a contract similiar to this specimen? A. They have.

Mr. Eggerman: We offer this in evidence.

The Court: It's the same as the one attached to the complaint?

Mr. Eggerman: Yes, sir.

Mr. Winter: May I see it, your Honor? Is this form of plaintiff—when was this form of plaintiff first used?

Mr. Eggerman: I believe in 1937 or '38.

Mr. Winter: Before that you didn't have any written agreement? [22]

The Witness: No, sir.

Mr. Eggerman: I was coming to that.

Mr. Winter: And this was used during all the period here involved,—1943, '44 and '45?

The Witness: Yes, sir.

(Testimony of Lloyd T. Baird.)

The Court: I think I shall—it will be admitted in evidence.

(Whereupon, Agreement referred to was then received in evidence, and marked Plaintiff's Exhibit 1.)

[Plaintiff's Exhibit 1 set out on pages 43 to 47.]

Q. You were, of course, associated with the firm as an officer and employee prior to 1937 and 1938?

A. Yes, sir.

Q. Counsel has asked you whether there was any written contract in effect between the plaintiff and the brokers associated with it prior to that date. Was there any difference between the oral agreement and understanding between the brokers associated with the plaintiff firm prior to the formulation of this contract, that is evidenced by the contract itself? A. No, sir.

Q. Tell us whether or not your firm engaged herein has or has not had similar relationships with other [23] real estate firms in the City of Seattle, independent firms like John Davis——

Mr. Winter: If the Court please, we object to that, as calling for a conclusion of the witness. I think he might confine his questions——

Mr. Eggerman: Well, if the Court please——

Mr. Winter: To the period here involved. I don't think it is going to help us any——

Mr. Eggerman: I will withdraw the question.

(Testimony of Lloyd T. Baird.)

Q. Where is most of the work that these brokers do, where is it done? A. In the field.

Q. Why is that so?

A. The very type of work requires that the properties must be shown, contracts must be made, clients must be interviewed, which in most cases, I would say, would be outside of the office.

Q. Now, who, if anyone, in the plaintiff firm, tells the broker how he should proceed in an effort to make a real estate sale or a lease?

A. No one does.

Q. Who determines the strategy and the procedure that shall be used by the individual broker in those cases? A. The broker, himself.

Q. Does your firm require the broker to observe any hour—— [24]

Mr. Winter: If the Court please, the plaintiff here can have a written agreement; that's the best evidence of what is required.

The Court: I think I shall let him answer the question as to the method they have. I think probably it would be well not to lead the witness too much.

Mr. Eggerman: Very well. Read the question, Mr. Reporter.

The Reporter: The question is (reading): "Does your firm require the broker to observe any hour——"

The Witness: It does not.

Q. Now tell us, when the broker has obtained an earnest money deposit, tell us what is done with that?

(Testimony of Lloyd T. Baird.)

A. The earnest money deposit is turned in to our escrow department.

Q. And where is it placed—under what heading on the books?

A. It is placed under a heading of Buyer and Seller.

Q. Giving the names of the buyer and seller?

A. That's correct.

Q. Now when, if ever, does the commission emanate from that escrow account bearing the name of buyer and seller?

A. I will have to have you repeat that, please.

Q. When does the commission emanate, or is taken out of that account?

A. At the final conclusion of the deal.

Q. Prior to that time what, if any, commission has Henry Broderick, Inc., or the broker received?

A. None.

Q. When that account is ready to close, what is done with the amount in the account that represents the amount of the commission earned?

A. One-half, or approximately one-half is turned over to the broker, and the other one-half is turned in to the firm's profit and loss account.

Q. Prior to that time, has any money from that particular transaction entered the profit and loss account of Henry Broderick, Inc.?

A. None whatsoever.

The Court: May I interrupt here just to ask you, suppose a prospective buyer makes a down payment and then subsequently abandons the deal and

(Testimony of Lloyd T. Baird.)

there is a forfeiture of his down payment, you have instances of that kind?

The Witness: Yes, we do, your Honor.

The Court: What do you do then?

The Witness: Normally, the money would be returned to the seller, with the exception of a [26] stipulated amount, which is provided for, I believe, in our Earnest Money contract, provides in case of forfeiture up to a certain amount shall be divided between the seller and the broker.

The Court: Well, does the plaintiff in this action get anything out of that matter at all——

The Witness: The plaintiff in this action would get—Mr. Enge can tell you better than this, or Mr. O'Brien, but I believe it is one-half.

The Court: It would be the same as earned commission?

The Witness: That's correct.

Mr. Eggerman: And would the broker receive any portion of it?

The Witness: The broker would receive his one-half, or approximately one-half.

Q. Now, I don't think I have asked you this question. I asked you about meetings of the employee salesmen? A. Yes, sir.

Q. Do you also have meetings of—at which the brokers are privileged to attend? A. We do.

Q. And are they required to attend those meetings? [27] A. They're not.

Mr. Eggerman: I believe that's all.

(Testimony of Lloyd T. Baird.)

Cross-Examination

By Mr. Winter:

Q. Mr. Baird, supposing a real estate salesman, an employee sells a piece of property and gets an earnest money receipt, what do you do with that earnest money; doesn't that go in to an escrow account?

A. Those go into the same account; yes, sir.

Q. And then when the deal is finally consummated, at the end of the month of the pay period, the salesman would get 40% and Mr.—and 40% goes into the profit and loss account of Broderick, Inc., 60% goes into the profit and loss account?

A. Not exactly like that, Mr. Winter. Immediately on the close of the sale, the office's proportion would go into the office's profit and loss account, the salesman does not receive his forty per cent until pay day.

Q. And of course the real estate—what you call the real estate broker they get 50% usually as commission, don't they? A. That's about it. [28]

Q. And they pay their own expenses?

A. That's correct.

Q. The salesman he gets 40% but the company pays his expenses? A. Correct.

Q. Do you figure it costs the salesman—costs the company approximately 10% of the sales for the expenses which you furnish for them?

A. I don't believe they're arrived at on that

(Testimony of Lloyd T. Baird.)

basis. We have felt that the man who is employed and paid for a specific purpose, was not entitled to——

Q. What per cent of your sales were made by brokers and what percentage by salesmen?

A. I'm afraid either Mr. O'Brien or Mr. Enge will have to answer that, Mr. Winter.

Q. And I understand it that these salesmen and property managers, they are required to spend all of their time, or as much as necessary, on property management? A. Correct.

Q. Now, do you have a Property Management Department? A. Yes, sir.

Q. You have a Real Estate Department?

A. Yes, sir.

Q. And you have a——

A. Insurance. [29]

Q. Insurance Department? They are the three departments? A. Yes, sir.

Q. Who is in charge of the Real Estate Department? A. Fred O'Brien.

Q. Mr.—who? A. Mr. Fred O'Brien.

Q. And is the Real Estate Department separated from the Insurance Department and the other departments?

A. It's a separate department, yes, sir.

Q. Well, I mean is it a separate room?

A. It's an entirely separate room from the insurance and the rental departments.

Q. And has a big sign over the entrance "Real Estate"?

(Testimony of Lloyd T. Baird.)

A. Over the entrance to that department, yes.

Q. To that department, and all of the men who sell real estate, both the brokers and the salesmen, have an office in that—I mean have a desk—or office space in that department. Is that true?

A. No, sir. The brokers have a desk in that department, but the salesmen have their—the salesmen in the property management department are in the Property Management department.

Q. Then you don't have—admit employees in the Real Estate Department office having offices, is that true?

A. Well, I believe we have one employee. [30]

Q. There's no salesmen that sell real estate?

A. No.

Q. Those are all brokers in there, aren't they?

A. They are all brokers, with the exception of one man, as I recall, who has to do with residential sales.

Q. And he is a salesman?

A. I believe he has a sales office.

Q. A full time man? A. Yes, sir.

Q. Who secures the listings from the Henry Broderick & Co.

A. Some come directly from—to the office through advertising; the brokers secure some themselves.

Q. Well, if the brokers secure a listing, is it then turned over into the Company's file and termed a listing with the Company? A. Yes, sir.

Q. And is a broker or salesman privileged to

(Testimony of Lloyd T. Baird.)

take any of the listings in the company's files?

Mr. Eggerman: Will Counsel repeat that question?

The Witness: Pardon?

The Reporter (Reading): And is a broker or salesman privileged to take any of the listings in the Company's files?

The Witness: Well, I think he can answer that fairly well. This all comes under Mr. O'Brien's department, [31] Mr. Winter, but—I would say generally—say yes.

Q. You're the property Manager?

A. Well, I am vice president and familiar generally with the entire office, although Mr. O'Brien would be able to answer more specifically the questions directed toward the Real Estate Department.

Q. Well, do the real estate brokers handle rentals for your department?

A. They don't handle any property management; they sometimes make a lease.

Q. And then they bring it into your department and it is handled there, is it?

A. The lease is made by a broker; it becomes a —to which a commission is attached. Then I believe, as I understand it, he is paid or he participates in the same manner in which he participates in the real estate sale.

Q. After—when the earnest money is received that is deposited in the account of Henry Broderick & Co.

(Testimony of Lloyd T. Baird.)

A. When the earnest money is received?

Q. Yes?

A. The—the funds you are referring to?

Q. Yes.

A. The funds as to—how they are deposited or how they are on our books, which is your question? [32]

Q. Well, how are they deposited—deposited in an escrow account belonging to the company?

A. They are deposited in the Company account.

Q. And then the Company's check is given to the salesman after the deal is completed?

A. That's correct.

Q. You don't have any contracts with such brokerage companies like John Davis & Company, do you? A. No, we don't.

Q. Nor with any other recognized brokerage company that has an office? A. No, sir.

Q. The only brokers that you have contact with are those that you furnish desk space, telephone service, and all those other things under your contract?

A. Those brokers associated with us, yes, sir.

Q. You have a broker's license yourself, don't you? A. I do, yes, sir.

Q. And yet you are vice president, and work for the plaintiff corporation?

A. That's correct.

Q. The only one that don't have a broker's license are those salesmen that are in the property management department?

(Testimony of Lloyd T. Baird.)

A. That, I believe, is it, with the exception I mentioned [33] that has to do with residential sales.

Q. Yes. You sell real estate for Henry Broderick & Co.? A. No, sir.

Q. Don't you? Did you ever sell any for them during the past?

A. I have cooperated in sales, yes, sir, but I don't——

Q. You don't get any independent commissions?

A. No, sir.

Q. That all goes to Henry Broderick & Co.?

A. It goes into the corporate fund, yes, sir.

Q. And in those sales in which you have participated, that all those funds go into an escrow account until the deal is finally consummated, and then the check is made to Henry Broderick & Company, and goes into its profit and loss account, is that right?

A. Any sale that I might have anything to do with, my position in that sale is simply in the way of cooperating, and the commission is handled just as any other commission.

Q. It doesn't go to the profit and loss account until after the sale is completed? A. No.

Q. All of these real estate men—real estate salesmen who have been employed by Henry Broderick & Company [34] have been on a salary basis, is that right? A. The salesmen?

Q. Yes. A. Yes, sir.

Q. And that is because of the nature of the business, is it, the reason you have to put them on a salary?

(Testimony of Lloyd T. Baird.)

A. Because they have specific obligations and duties to perform for the office and the office clients.

Mr. Winter: That's all.

Redirect Examination

By Mr. Eggerman:

Q. You are likewise an officer and stockholder with the plaintiff, are you not? A. Yes, sir.

Q. Now, I understand that these listings are available to all the brokers? Is that right?

A. Yes, sir.

Q. But in the case of the salesmen, is that true? Or are they assigned, by the firm, to certain prospects?

A. I would say as to salesmen primarily, their sales are assigned to them. However, I believe that they could look at the file.

Q. Now, one other question. Regardless of whether a deal [35] is handled by a real estate salesman or a real estate broker, until that deal is closed, it always goes through an escrow account, does it not? A. That's correct.

Q. Now explain, in view of Counsel's question, the difference between the transaction where it's handled by a salesman, or initiated by a salesman, and where it's initiated by a broker, when that escrow account is ready to be closed and the commission is assured.

A. Well, in the case of a broker, the commission is—as soon as the deal is closed, the broker's

(Testimony of Lloyd T. Baird.)

portion of the commission is immediately paid to him, and the firm's portion goes into an escrow account—I mean into a profit and loss account. In the case of a salesman, the same applies as far as the firm's funds are concerned, it goes immediately into profit and loss, but the salesman does not receive his until his pay day.

Q. In other words, all the commission goes into the plaintiff's profit and loss account in the case of a salesman's transaction?

A. That's correct.

Q. And then later the salesman receives a bonus paid by the firm with his salary?

A. With his regular salary check, yes, sir. [36]

Mr. Eggerman: I believe that is all.

The Court: I want to ask you one or two questions. When a listing of property is taken from the owner, is it taken on a form that the Company has?

The Witness: If it is an exclusive listing, your Honor, we have a form for exclusive listings, which is an office form. An open listing, very seldom is put—is on a form, but we do have a card form for it.

The Court: Well, is that card form the broker's individual card, or is the exclusive listing the broker's individual——

The Witness: Neither one—both on office forms.

The Court: Now, could one of these brokers,—by the way you have enumerated them in this complaint over the three years that are here involved, for the purpose of my question let us take S. R.

(Testimony of Lloyd T. Baird.)

Holcombe, his name appears in at least two of the three years here involved, could he go to some other firm if he saw fit and sell for them as well as for you? [37]

The Witness: Could he, as far as we are concerned?

The Court: And does he, or is that the practice at all?

The Witness: I don't believe it would just in that way. He might very often sell a property that was listed for another firm. For instance, John Davis & Company might have a property listed which Mr. Holcombe might sell.

The Court: If they had an exclusive listing, you would say?

The Witness: Either exclusive or sometimes if they had an open listing.

The Court: But if they had an exclusive listing?

The Witness: Then he would have to work for them.

The Court: Well, but do they do that?

The Witness: Pardon?

The Court: Does that practice prevail?

The Witness: Quite often, yes, sir.

The Court: And then the commissions are divided usually on fifty-fifty basis in that kind of a transaction?

The Witness: Usually the commission is [38] divided fifty per cent to each office, insofar as the—for instance in this case supposing that West and Wheeler, the commission were a thousand dollars,

(Testimony of Lloyd T. Baird.)

West and Wheeler would receive five hundred dollars as a rule, then five hundred dollars would go into our escrow account until it was closed, and then the broker would receive his one-half immediately on the closing and confirmation of the deal and the other would go into the firm's profit and loss.

The Court: Well, then he wouldn't be free to handle it independent of your—of your company then?

The Witness: Without—without——

The Court: Without accounting for——

The Witness: No, sir, he wouldn't.

The Court: Now, I assume, but I think to make sure I think I will ask a question; when a sale is made and then there are certain details that are necessary, the papers prepared, the conveyances and then title insurance as a rule, and is that all ordered by the broker, that is, the title insurance, or is that ordered by someone in your firm?

The Witness: We have a man who is in charge of escrow department who is very often, and I would say probably in a majority of cases, order it, but very often the brokers order their own. [39]

The Court: And who is billed for it?

The Witness: The bill would come to Henry Broderick, Inc.

The Court: And then they pay for it and charge it back to the client?

The Witness: It would come out of that escrow fund.

The Court: I think that is all that I have in mind.

Mr. Eggerman: May I ask one question in redirect, your Honor, before you adjourn?

The Court: Yes.

Mr. Eggerman: With reference to listings, does it—state whether or not it does occasionally happen that a broker obtains a listing and enters into a contract of—or gets an earnest money receipt before that listing ever gets into the firm?

Mr. Winter: Oh, that is leading, if the Court please.

The Court: Oh, he may answer it.

The Witness: That happens, yes, sir.

Mr. Eggerman: That's all.

The Court: I think we will take an adjournment now till 2:00 o'clock this afternoon.

(Recess.) [40]

November 12, 1946

2:00 o'Clock P.M.

FRED J. O'BRIEN

produced as a witness on behalf of the Plaintiff, after being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Eggerman:

Q. What is your name, Mr. O'Brien?

A. Fred J. O'Brien.

(Testimony of Fred J. O'Brien.)

Q. What is your official connection with the firm of Henry Broderick, Inc.?

A. Secretary.

Q. How long have you been associated with that firm? A. Approximately five years.

Q. What are your duties in general?

A. In addition to those duties generally exercised by a Secretary, I am Manager of the Real Estate Department.

Q. And as Manager of the Real Estate Department, what are your particular activities?

A. To discuss with the associate brokers at meetings in the morning, real estate activities in the City of Seattle, new listings that are brought in, and general discussion regarding real estate activities by the men. [41]

Q. These meetings that you refer to, are they optional or compulsory, sir, so far as——

A. They are optional, Mr. Eggerman.

Q. How many brokers are so associated with the firm at this time in all?

A. About eighteen or nineteen; it changes from time to time; but I checked the list this morning; it was nineteen.

Q. Tell us, if you know, whether any of these brokers before becoming associated with the firm were engaged, themselves, in the real estate business? A. Yes, sir.

Q. And do you know whether or not some of them have been so engaged for a long period of time before becoming so associated with you?

(Testimony of Fred J. O'Brien.)

A. Yes, they have. Many of them have been in the business for many years before coming to us.

Q. What type of license do these brokers carry?

A. Real Estate Brokers License.

Q. And who makes application for those licenses? A. The broker.

Q. And who pays the expense?

A. The broker.

Q. Who furnishes the bond?

A. The broker.

Q. And such other state taxes as are required to be paid, [42] who pays those?

A. The broker.

Q. What—with reference—I will withdraw that. Some of these, or nearly all of these brokers own their own cars? A. Yes, sir.

Q. Who takes care of the upkeep and the gasoline and the general expense?

A. The brokers take care of their own cars.

Q. And the insurance, if any, on their cars?

A. Their insurance, also.

Q. Since you have been associated with the firm, tell the Court, who, generally, interviews such prospects as apply to become associated brokers with your firm?

A. I do that interviewing now, Mr. Eggerman.

Q. Who did it before?

A. Mr. Broderick.

Q. And what do you seek to ascertain in these interviews with these prospective brokers?

A. The first thing I seek to ascertain is whether

(Testimony of Fred J. O'Brien.)

they have a Real Estate Brokers License. If they have a Real Estate Broker's License, then I discuss their qualifications, and also their financial conditions. I do that because the men work on——

Mr. Winter: We don't want his conclusions. [43]

Mr. Eggerman: I will ask you the reason why you are interested in the financial condition of these prospects as associated brokers?

A. Because the men are not advanced any money and the only remuneration they have is from the commissions that they earn from sales, and it has been our experience that if a man is not financially able to carry on his livelihood he does not prove to be a very good associate broker.

Q. Now, it already appears that the firm has, what we call, listings in the office. From what sources are those listings made up of?

A. Most of the listings come to the firm because of our reputation; many of them are turned into the firm by the brokers; many of them are obtained from real estate ads.

Q. Tell us whether or not those listings are available to all brokers? A. They are.

Q. What, if any, supervision do you exercise over these brokers, either as to what listings they will work on; what prospects they may try to see, or the strategy of their work?

A. I exercise no supervision over the brokers.

Q. Does any one in the firm attempt to do so?

A. No, sir. [44]

Q. Referring again to these listings, are there

(Testimony of Fred J. O'Brien.)

any instances where a broker may obtain a listing and close an earnest money deal before the listing ever gets to your office?

A. That has happened.

Q. Tell us whether or not there are any specific hours required of these brokers? A. No, sir.

Q. Is there a variation in the amount of time that the individual broker may give to the real estate business?

Mr. Winter: Now, isn't that a matter of construction of the contract, if the Court please? The contract is the best evidence. If the contract is in writing, then the contract is the best evidence.

Mr. Eggerman: I am not asking about the contents of the contract. I am asking what they do, how much time they put in.

The Court: He may answer.

A. The broker puts as much time as he desires into his work.

Q. And is there any variety as to the amount of time one broker may put in as compared to another?

A. Yes.

Q. Can you give us any illustrations of any brokers [45] who have other activities besides the real estate business to which they devote time?

A. Yes, I can give you two examples. One is an associate broker, Mr. Wilson. He is engaged in the food brokerage business with a firm, and another is an associate broker by the name of Jack Stewart, who owns and operates the Parker House part of the time.

Q. Can you think of any other illustration?

(Testimony of Fred J. O'Brien.)

A. I don't think of any other just now.

Q. How about Mr. Robbins?

A. Mr. Robbins, of course, has outside activities; for instance he is Chairman of the Board of the Seattle Pacific College, that work takes some of his time, and he devotes time to that and other things that I'm not familiar with.

Q. Can you tell us anything about an associate broker by the name of Mr. Flemming?

A. Yes, sir.

Q. Just briefly?

A. Several years ago Mr. Flemming had a—discovered that he had a damaged heart, and his doctor requested that he devote only a small time—a small, few hours a day to his work, and for the last couple or three years, maybe four years now, I don't think Mr. Flemming has worked more than one or two hours a day. [46]

Q. How about Mrs. McKenzie?

A. Mrs. McKenzie works on residential property; she lives in the suburbs; she gets to the office probably once a week.

Q. In other words, who determines the amount of time any broker will devote to the real estate activities? A. The broker.

Q. Is there any limitation on the field of the broker's activity. I mean, in any area that he is limited to, or excluded from? A. No, sir.

Q. Any limitation upon the character of the property in which he may transact his business?

A. No, sir.

(Testimony of Fred J. O'Brien.)

Q. Who determines the character of property, or the area, if there is a preference?

A. The broker, himself.

Q. In the advertising, whose name frequently appears in the advertising that is run by your firm?

A. In most every case the broker's name appears and also his residential telephone number.

Q. Is any part of this advertising expense, where the residence telephone number is listed for the broker, paid for by the broker?

A. No, sir. [47]

Q. Tell us whether or not some of their work then is transacted from their residence?

A. A great deal of their work is transacted from their homes.

Q. Now, if a broker's name appears on a specific advertisement, in connection with a given piece of property, does that preclude another broker, if he finds a prospect and wants to sell that property, from selling it? A. It does not.

Q. Now, have these brokers any specific hours that they are required to be in the office of the firm?

A. They do not.

Q. Any routine laid down that they have to follow? A. No, sir.

Q. Any specific calls that they are required to make by the firm? A. No, sir.

Q. Tell us whether or not there is any objection on the part of the plaintiff to a broker having other activities than the real estate business, such as the food business? A. No, sir.

(Testimony of Fred J. O'Brien.)

Q. Now if a broker has been unable, over a period of time, to affect any sales or leases, as a result of which no commissions have been earned, does he receive any [48] compensation from Henry Broderick in any form? A. He does not.

Q. Where is most of the productive work done by the broker?

A. Most of the productive work is done in the field.

Q. Why is that so?

A. It is necessary to contact the prospective purchasers or owners at the place of business, and it's necessary to inspect the property, and generally speaking, the more effective work can be done outside the office.

Q. Where are the earnest money receipts signed?

A. I think most of the earnest money receipts are signed in the purchaser's home, or place of business.

Q. Where are the closing details of the transaction frequently worked out?

A. Well, they are worked out either in an attorney's office, in an Escrow Company or in our office.

Q. Now, who determines the mode of approach, the method of handling, the efforts to make a successful real estate sale or lease—your firm or the broker? A. The broker.

Q. Do you make any effort to control that?

A. No, sir.

Q. Now, for the purpose of clarifying the record [49] I remind you that the contract refers to

(Testimony of Fred J. O'Brien.)

an even division of the commission between the broker and the firm? A. Yes, sir.

Q. What have you to say with reference to your practice where exclusive listings are brought in?

A. It has been the practice between the brokers and the firm to pay a listing fee to the broker who obtains an exclusive listing. Generally that is 10%. That 10% is deducted from the gross commission, and the balance divided one-half to the broker and one-half to Henry Broderick, Inc. Now, about a year ago, because of conditions where listings are very valuable, the brokers, between themselves, decided they would offer a little better inducement for obtaining exclusive listings, so now if a broker obtains an exclusive listing, and does not sell the property, he obtans 20% of the gross commission—that 20% is deducted, 5% from one-half which goes to the firm, and 15% of the half which would go ordinarily to the broker. In other words, the selling broker gets 35%, the listing broker 20% and Henry Broderick, Inc., 45%.

Q. In other words, if I understand it, during the past year, while the firm's share of the commission in the case of an exclusive listing has remained the same, [50] the brokers had agreed among themselves to give a better percentage to the one bringing in—to the broker bringing in the exclusive listing? A. That's right.

The Court: Well, if the broker who brought in the listing also makes the sale?

The Witness: That's a fifty-fifty deal. There

(Testimony of Fred J. O'Brien.)

is no inducement then for him to have more than half the commission.

Q. Tell us whether or not any of the brokers correspond on their own stationery, or write letters on real estate business from their own home?

A. Yes, sir, they do.

Q. Can the broker sell a piece of property for any price—for any other price than the list price—listed with your firm?

A. Yes, he can. It's a matter of negotiation between the buyer and the seller.

Q. That would be as a result of his contacts with the owner, would it not? A. That's right.

Mr. Eggerman: I believe that's all.

Cross Examination

By Mr. Winter: [51]

Q. Now, Mr. O'Brien, do you hold real estate meetings every morning—do you?

A. We have a real estate meeting every morning, yes, sir.

Q. What time? A. Except Saturdays.

Q. At what time is that meeting?

A. 8:45.

Q. 8:45? A. Uh-huh.

Q. And most of the real estate brokers attend, do they not?

A. Well, we—we have a pretty good attendance, yes, sir.

Q. And of course, if they're off working on a deal, of course they don't come to the meeting?

(Testimony of Fred J. O'Brien.)

A. It isn't compulsory that they come.

Q. What do you discuss at those meetings?

A. We discuss sales that have been made in and around Seattle; we have a list taken from the morning's Journal of Commerce, it shows the property, the buyer and the seller, the consideration; we also discuss listings that have been turned in; we all discuss firms; we ask the men to discuss between themselves experiences they've had the previous day or previous to that regarding real estate negotiations, and generally exchange ideas which might be beneficial to everybody. [52]

Q. Well, do the real estate salesmen, the employees, do they attend the meetings also?

A. No, sir.

Q. These are just meetings of the Real Estate Department?

A. That's right—that's right.

Q. And that meeting is held in the office of Broderick, in the real estate——

A. In the Real Estate Department. It's held in my office.

Q. And you are in charge of the meeting, are you not? A. That's right.

Q. And who else comes—what other officers of the firm attend that meeting?

A. Occasionally Mr. Baird comes into the meeting.

Q. And Mr. Broderick used to come into the meeting, didn't he? A. Well, occasionally.

Q. Before his sickness?

A. No, Mr. Broderick hasn't been in a meeting for several years.

(Testimony of Fred J. O'Brien.)

Q. Well now do you furnish these brokers with stenographic service? A. Yes, sir.

Q. And stationery? A. That's right.

Q. And with calling cards? [53]

A. Yes, sir.

Q. Do you have one of your own calling cards?

A. Yes, sir.

Q. May I see it, please? You don't mind if I have it? A. No, not at all.

Q. As a matter of fact you furnish cards to all the salesmen including the brokers, don't you?

A. Yes, sir.

Q. And they are printed and paid for by the firm? A. That's right.

Q. Do you have similar letterheads printed in each man's name? A. No, sir.

Q. Well, what stationery do they use—the Henry Broderick regular stationery?

A. If they care to.

Q. You also furnish telephone service to all of the real estate salesmen and brokers?

A. Yes, sir.

Q. And they are on the board—they are listed on your switchboard? A. That's right.

Q. The earnest money receipts are printed on forms of Henry Broderick Company?

A. That's right.

Q. And, as a matter of fact, all of the papers which go [54] into the transaction, are printed and paid for by Henry Broderick Company?

A. That's right.

(Testimony of Fred J. O'Brien.)

Q. Outside of the expenses which a man is going—which a broker has when he is out selling real estate, what expense does he have in the business?

A. We take care of practically all of the office expense.

Q. Then his only expense is, of course, transportation in going out and interviewing?

A. No, he has his expenses of licenses, insurance and bond—they pay for that.

Q. You have a broker's license yourself, haven't you? A. Yes, sir.

Q. In your own name? A. Yes, sir.

Q. Did you buy your own broker's license?

A. No.

Mr. Eggerman: Just a moment, if the Court please. This witness is an officer and stockholder in the company——

The Court: Oh, he can answer. Proceed.

The Witness: Will you repeat the question, please?

The Reporter (Reading): "You have a broker's license yourself, haven't you?

"Answer: Yes, sir. [55]

"Question: In your own name?

"Answer: Yes, sir.

"Question: Did you buy your own broker's license? Answer: No."

A. I have a broker's license, but it is catalogued as a member of the firm.

Q. Yes. But you had a broker's license before you became a member of the firm, didn't you?

(Testimony of Fred J. O'Brien.)

A. Not immediately before. I had a broker's license twenty years ago and I dropped that broker's license when I went with the Government—I was with the Home Owners Loan Corporation for several years, and then I took another examination and I have now another broker's license.

Q. Well, the annual broker's license is the same as the annual real estate license, isn't it; real estate salesman's license, in policy?

A. I—I don't think it is now. I would have to check that; at one time it was the same. I believe the application fee is more for a broker's license now than it was then, uh-huh.

Q. But several years ago, I mean during this time 1943, it was all the same, wasn't it?

A. I think so.

Q. You say there are some eighteen or nineteen brokers? A. That's right. [56]

Q. And how many real estate salesmen?

A. Mr. Baird testified to eleven, I believe that's right.

Q. You don't have any under you in the Real Estate Department?

A. No, sir, with the exception of Mr. Barton, who is the manager of the real estate—of the residential sales department, and Mr. Barton has a real estate salesman's license, he supervises the activities of our residential brokers.

Q. Well, Mr. O'Brien, do any of your brokers specialize in the selling of business property——

A. Yes, sir.

(Testimony of Fred J. O'Brien.)

Q. And others specialize in selling residential property? A. Yes, sir.

Q. Do you assign them territory?

A. Well—a—no, there is no assignment of territory; there is this arrangement, where the broker lives in a certain section of town, for convenience, say, we—he specializes in that territory.

A. You assign him the listings in that territory—give him the listings in that territory, do you?

A. Well, if we have a call in that particular area, yes, sir.

Q. And there are certain men who are assigned listings [57] in all business districts, like Mr. Downs, for example?

A. Well, if a call comes in for a certain type of property I use my judgment in giving it to the broker who is best qualified to handle that type of a transaction.

Q. And you turn it over to him?

A. That's right.

Q. If a listing for a house came in, you'd turn it over to one of your men that you know could handle house sales better than the others?

A. I would either do it directly, or give it to Mr. Barton, who is the manager of the residential sales department.

Q. And then he would turn it over to the——

A. Well, the broker he thought best qualified to handle that particular type of inquiry.

Q. The listings give Henry Broderick the right

(Testimony of Fred J. O'Brien.)

to make the sale; it's not listed in the name of any broker. Is that right?

A. No, it's in the name of Henry Broderick, Inc.

Q. Any listings that a salesman gets, or a broker gets, he turns over to—the listing to Henry Broderick, Inc. A. That's right.

Q. And that listing is the property of Henry Broderick, Inc.? [58]

A. If it's an exclusive listing, the broker has an interest in that, as I explained about the commission agreement.

Q. Yes, but the listings is not taken in the broker's name, whether he——

A. No, no, it is taken——

Q. In the name of the firm?

A. That's right.

Q. The listing is taken in the name of Henry Broderick, Inc., and that's the way your earnest money receipts are made out?

A. That's right.

Q. Do the men in the morning make reports to you as to their progress of what they've been doing the day before at these meetings?

A. No, sir.

Q. Well, they discuss the case they were working on the day before?

A. Not necessarily.

Q. Well, I say occasionally they do, don't they?

A. Oh, if there is some experience that they think would benefit the rest of the brokers in the way of experience, but it isn't customary to do that,

(Testimony of Fred J. O'Brien.)

because in the real estate business, Mr. Winters, a man working on a deal keeps the negotiations quite confidential. [59]

Q. Well, you try to get men that are competent and well qualified and who have experience——

A. That's right.

Q. In selling real estate? A. That's right.

Q. And when you interview them that is your purpose? A. That's right.

Q. To get men of subtance, and someone who can meet the public and not be a detriment to Henry Broderick, Inc.? A. That's right.

Q. In other words, you have in mind Henry Broderick's long standing in doing a good job in the real estate business? A. That's right.

Q. You wouldn't long keep one of these brokers associated with you who was out selling real estate for someone else, all the time, would you?

A. No, he would be breaking our agreement.

Q. In other words, under your agreement he is required to—to work for Henry Broderick and not for anyone else? A. No—no——

Mr. Eggerman: Just a minute——

The Witness: The written contract doesn't state that.

The Court: Well, but what is the practice?

The Witness: The practice is, that if a [60] man does not devote enough time to the consummating deals with Henry Broderick, while he is associated with Henry Broderick, we generally have an interview with him and ask why he can't spend

(Testimony of Fred J. O'Brien.)

more time working on deals with us, and if he engages more than half the time, we will say, in some other business, I think it is to the best interest of both parties, that he——

The Court: Well, we're not talking about other business, but, outside the real estate business, the business of selling real estate and taking listings, for real estate, leases; haven't you had brokers or do you permit them to make sales for some other concern without reporting in to you and clearing through your establishment?

The Witness: No, that is not done, your Honor.

The Court: It isn't done, or you wouldn't permit it?

The Witness: No, I—I don't think it would be a satisfactory arrangement.

The Court: Well, have you had experience where they attempted to do that?

The Witness: No, sir, I don't know of any.

The Court: Have you had any experiences where they attempted to transact business on their own independent of Broderick in part of their transactions?

The Witness: That has come to my attention.

The Court: If they did that would you consider that a breach of a partnership—or employment, or whatever it might be called?

The Witness: Yes, I would consider that a breach of our agreement.

The Court: I have another question or two, and you may go on after I get through.

(Testimony of Fred J. O'Brien.)

Now, on these automobiles or other means of transportation that they use in carrying on the business, do they carry any insignia on there indicating who they are, or who they are associated with?

The Witness: No, sir.

The Court: Nothing to show that they are brokers associated with Henry Broderick?

The Witness: No, sir.

The Court: Any—and none of them have any individual stationery that identifies them as associated with the Henry Broderick Corporation?

The Witness: Not that I know of, your Honor.

The Court: Well, do they have a free hand each morning at your whole listings; do you have, say fifty listings that are open for servicing—you have eighteen brokers. Can they just take them as they wish? [62]

The Witness: Yes, sir. I wish—pardon me, your Honor, fifty listings would be a wonderful position to be in.

Mr. Eggerman: I can't hear you.

The Witness: Pardon?

Mr. Eggerman: I can't hear you.

The Witness: I was going to mention this, at this time listings are so scarce that we never have fifty, but say we have five, your Honor——

The Court: Five — and you have eighteen brokers?

The Witness: That's right. We make a copy

(Testimony of Fred J. O'Brien.)

of each analysis and give it to the brokers, and they can work on the property.

The Court: They can all work on the property?

The Witness: That's right.

The Court: If they wish?

The Witness: That's right.

The Court: And then, don't you—aren't you then confronted with the problem of how you are going to divide the commissions?

The Witness: No. The agreement between the brokers and the office is the man that brings in the first check as an earnest money deposit on that property has the preference, and we do not invite other deposits until that deal is either rejected or consummated.

The Court: I think that's all that I wish to ask.

Mr. Eggerman: Just two questions, Mr. O'Brien.

Redirect Examination

By Mr. Eggerman:

Q. Is it a fact that in addition to being an officer you are a stockholder, yourself, in the plaintiff firm? A. Yes, sir.

Q. Now, with reference to the listings you testified to awhile ago, I think you said that if a listing in a particular residential area come in, that you would call that to the attention of the man specializing in that area?

A. No—a—suppose a listing would concern a residential area, that listing would be copied and given to every one of the residential sales brokers.

(Testimony of Fred J. O'Brien.)

Q. And does that also apply to those specializing in business property? A. Yes, sir.

Q. In other words, then, I want to make this clear, I couldn't understand you in your answer to Mr. Winter, do you attempt to give priority to any particular [64] broker on any business that he has—can do?

Mr. Winter: Now, we suggest that the question is leading, if the Court please.

Mr. Eggerman: I'm just asking a question—haven't suggested an answer.

The Court: He may answer.

A. No, sir, we do not. But there are brokers who are more qualified to handle certain types of inquiry than others.

Q. Very well.

A. And so we, in assigning these inquiries, try to use judgment in making the best assignment for the benefit of the broker and Henry Broderick, Inc.

Q. In other words, who is specializing in Mount Baker residential property on the rolls?

A. At this time, Mr. Samsell, Howard Samsell.

Q. Does that fact prevent another broker from selling Mount Baker property?

A. It does not.

Mr. Eggerman: That's all.

Recross Examination

By Mr. Winter:

Q. Mr. O'Brien, when you give one man an

(Testimony of Fred J. O'Brien.)

assignment, isn't it understood amongst the other brokers that no—that none of those other brokers will work on that assignment [65] until he is finished with it?

A. You're talking about the prospective purchaser now?

Q. Well, when he gets——

A. Assignment of a prospect or listing?

Q. Yes. Well, either one?

A. Well, it's only good business, Mr. Winter, that only one broker contact a prospective purchaser. It wouldn't be practical for two or three brokers to discuss a residence, I don't think at the same time; that same thing goes in investment property. It does not mean that they can't do it.

Q. Well, when you give one of the brokers an assignment he handles that assignment and takes care of that customer? A. That's right.

Q. And the other brokers don't do anything until he is finished with that assignment, do they?

A. Certainly not.

Mr. Eggerman: Just a moment, if the Court please. The witness was talking originally about these analyses, which is the listing. Now he is confusing this with a prospect. When the witness testified that he gave an analysis of the piece of property first to the——

The Court: I don't think it's necessary to [66] make an argument. This witness is an intelligent witness, I am sure he understands the real estate business perhaps better than any of the rest of us.

(Testimony of Fred J. O'Brien.)

Mr. Eggerman: I think so.

The Court: But what I want to get clear is now, you said that anyone of your staff of associate brokers may take your whole list and go out and sell a property that is listed with you, and if he is the first of the eighteen, or sixteen that you have, to come in with an earnest money check, why the sale would be credited to him if it was ultimately consummated?

The Witness: Yes, sir.

The Court: And then, in answer to the question that Mr. Winter asked, of when—that you make a listing and give it to a broker, the others are all supposed to keep hands off?

The Witness: No, sir.

The Court: That's what I want to get clear.

The Witness: Your Honor, I'll attempt to clarify that. A listing comes in and we make the necessary copies to distribute that listing to all of our brokers. Now in the case of our associated residential brokers, they not being interested in commercial property, they get all of these residential listings. In the case of a commercial broker, he gets copies of [67] all of the commercial listings. Now if one of the brokers was successful in obtaining an earnest money deposit, he brings that in to the office, and we tell the rest—the other brokers that there is a deposit on that particular piece of property; the other brokers do not attempt to bring in another earnest money deposit until that first offer is disposed of.

(Testimony of Fred J. O'Brien.)

The Court: Well, then, all your residential brokers, when they start out in the morning, they start out with the whole listings that you have?

The Witness: That's right.

The Court: All of them.

The Witness: That's right.

The Court: And all of your commercial brokers likewise have a listing, or complete listing of all the commercial——

The Witness: That's right.

The Court: And they're not given individual assignments in either case?

The Witness: No, sir. I referred to assignments a few minutes ago. We will refer to Mr. Samsell, our broker who is living in Mount Baker. He specializes in residential sales in the Mount Baker area. If we have a call or inquiry for property in Mount Baker, that number or name would probably be [68] referred to Mr. Samsell.

The Court: Well, then, won't it be referred, likewise, to all the rest of the group?

The Witness: Referring to prospects, your Honor, I'm not referring to listings now. If a listing comes in we will make a copy of that listing and that will be distributed to all the brokers, but we do not make a practice of giving the name of prospects to more than one or two brokers, and the one or two brokers are the men we feel are best qualified to handle that particular type of an inquiry.

The Court: And if you find they haven't been successful after you furnish them with the list, then you give it to another one?

(Testimony of Fred J. O'Brien.)

The Witness: No, sir, not generally, because the men are all independent operators; they generally follow through on the listings, or on the inquiries or prospects, and either consummate a sale or decide in their own mind that it's hard to sell them.

The Court: If there is any difficulty arising, resulting in a dispute, short of litigation, and the property owner or the buyer becomes involved, do you settle those disputes through your office, or corporation, or do you just leave it to the individual broker?

The Witness: Well, we feel that the individual [69] broker should settle any dispute. We fortunately haven't had very many disputes.

The Court: Well, if any litigation grew out of—litigation for commission, or litigation for anything that—there's a hundred things that might arise from such a transaction, would the corporation then take the matter over and care for it?

The Witness: We would do that, yes, sir. We would do that, I'm sure as far as our interest appears.

The Court: You mean you haven't had those situations?

The Witness: No, no, I'm sure we have not. I don't recall any such cases.

The Court: You never considered the brokers as your agents?

The Witness: No, no. We consider the brokers just as associates; they—we furnish them office

(Testimony of Fred J. O'Brien.)

space as the contract calls for; we do not exercise any supervision over them, your Honor.

The Court: I think that's all.

Mr. Eggerman: I would like to have the records show, Mr. O'Brien, precisely what you mean by the word "listing". When you say "distribute listings" what is that? [70]

A. A listing is a form showing all the details in connection with a certain piece of property, including the address, the description; in the case of a residence, the number of rooms, type of construction, encumbrances, the asking sales price.

Q. The details of the property?

A. The details of the property.

Mr. Eggerman: That's all.

Mr. Winter: That's all.

(Witness excused.) [71]

ARTHUR ENGE,

produced as a witness on behalf of the plaintiff, after being first first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Eggerman:

Q. State your name to the Court, please.

A. Arthur G. Enge:

Q. How do you spell your last name?

A. E-n-g-e.

(Testimony of Arthur Enge.)

Q. And you are likewise associated with the plaintiff? A. Yes, sir.

Q. In what capacity?

A. I am Treasurer of the company.

Q. And you are likewise a stockholder in the company? A. Yes, sir.

Q. What do your offices embrace as—your duties as Treasurer embrace?

A. They embrace responsibility for paper work in connection with the accounting, procedures in the three departments of our office—real estate, property management and insurance.

Q. How long have you been associated with the firm? A. For—pretty near five years.

Q. I beg your pardon?

A. As an officer for nearly five years, and associated [72] as an employee for about sixteen.

Q. Now, first with reference to the salesmen. You are in charge of the books; do you know who pays for their salesmen's licenses and the premiums on their bonds?

A. Yes, I do. Henry Broderick——

Q. Who does that?

A. Henry Broderick, Inc., does.

Q. Are they on a salary basis or otherwise?

A. They are on a salary basis, plus a bonus arrangement.

Q. How often is their salary paid?

A. Twice a month.

Q. Now, what does the bonus consist of?

(Testimony of Arthur Enge.)

A. It consists of a percentage of the commissions that are earned by the office with respect to their activities, together with a bonus for bringing in new property management accounts, and so forth.

Q. And are their salary and bonus accounts under your supervision? A. Yes, sir.

Q. What percentage of their time, on an average, is devoted to efforts to make sales, or to make leases and so on?

A. Well, I would say less than 25%.

Q. What, however, are they required to do before they can endeavor to earn bonuses in those activities?

A. Well, they are required to hold down their jobs and [73] perform other duties that they are paid a salary for, which is the management of the properties that are under our care.

Q. Now, when their efforts bring a commission into the firm, either a lease or sale commission, where does that commission go—into what account?

A. It goes into a profit and loss account, which might be designated to the Real Estate Commission or Rental Commission, depending upon the nature of the deal that they have been instrumental in making.

Q. Are these two accounts, one a rental and the other sales accounts? A. Yes, sir.

Q. Tell us whether they are both profit and loss accounts?

A. They are both profit and loss accounts.

Q. Now, does the firm immediately pay the

(Testimony of Arthur Enge.)

salesmen when he brings a commission into the firm?

A. Not unless it should happen to coincide with the regular pay day.

Q. Otherwise when is it payable?

A. On the regular pay day.

Q. Does the firm require these employee salesmen to pay any part of their sales expense, such as may be necessary in these activities?

A. No, sir. [74]

Q. What is the difference, if any, between the expenses that the salesmen—real estate salesmen have to bear, or not bear, and those which the brokers have to bear?

A. A broker is obliged to pay all his expenses of whatever nature; a salesmen is not required to pay any expenses he may be put to.

Q. Now, if a broker should become an employee of your firm—I mean one holding a broker's license, if he should become an employee of your firm, is he permitted to continue as a salesman for you under his broker's license?

Mr. Winter: We object to that, in that it calls for a conclusion. It is a question of law as to whether or not——

Mr. Eggerman: No, I am asking him if the firm would continue to hire him, and I think this witness, in charge of the books and as Secretary of the company, or rather Treasurer, should know the answer.

(Testimony of Arthur Enge.)

The Court: Will you please repeat the question again?

Mr. Eggerman: Is he permitted to continue with the broker's license as an employee, on your payroll, if he has only a broker's license?

A. No, he is not. [75]

Q. What does he have to do?

A. He's required to surrender his broker's license and make application and obtain his salesman's license.

Q. Who pays the oil, gas and upkeep on the broker's car? A. They pay them, themselves.

Q. Now, turning again to bookkeeping, Mr. Enge. I understand that's in your department?

A. Yes, sir.

Q. Is there any distinction in the manner in which the commissions are handled, where a commission emanates from the efforts of a broker, as contrasted with the commission that is brought in as a result of the activity of a salesman?

A. Yes, there is a very distinct difference.

Q. Now just explain that to the Court, will you?

Mr. Winter: If the Court please, the books are the best evidence; if they're going to ask him to testify about some accounts—let's have the accounts.

Mr. Eggerman: If the Court please, I am asking for his procedure, generally, I am not asking for any specific thing now.

The Court: He can answer.

A. In the case of a broker, the commission, as has been previously described, comes to him out of

(Testimony of Arthur Enge.)

the—the [76] escrow account which is set up under the name of the seller and the purchaser, at the same time that the commission comes in to the profit and loss account of Henry Broderick, Inc., through its share. In the case of a salesman, in the event that it is an escrow deal, the commission is all distributed and paid in to the profit and loss account at the time of consummation of the deal.

Q. Whose profit and loss account?

A. The profit and loss account of Henry Broderick, Inc., without reference to any bonus that may be due to the salesman.

Q. How are these accounts that you term "escrow accounts" headed or entitled?

A. By the name of the seller and the purchaser.

Q. And what usually constitutes, in practice, the first entry in such an account?

A. The earnest money deposit.

Q. And as the deal progresses and money is paid on the purchase price, where does that go?

A. Into that same account.

Q. When is any portion of that commission first entered in the profit and loss account of Henry Broderick, Inc.? I am talking about brokers' transactions.

A. When the deal is consummated and the commission distributed. [77]

Q. And when does the broker receive his portion of the commission? A. At the same time.

Q. With respect to the firm?

A. At the same time.

(Testimony of Arthur Enge.)

Q. Now, if the broker, regardless of the amount of time that he may have spent in endeavoring to make a deal, if he is unable to make the sale or make a lease, does he get anything from the firm?

A. No, sir.

Q. Where are the earnest money receipts frequently signed?

A. Most frequently, I believe, in the office of the buyer or at his home.

Q. And where are the closing details frequently worked out?

A. Most often, I believe, at the same location that the earnest money is signed.

The Court: Of course, that would be true of your salesmen, also, wouldn't it, if they made a transaction?

The Witness: The salesmen would probably require a good deal more help and supervision and would have to have it brought in to the office,——

The Court: No, but if the salesman had the capacity to close the deal, he probably would close it in the same manner as the broker did, wouldn't he? [78]

The Witness: If he had the capacity, I imagine that would be true.

The Court: That's all.

Mr. Eggerman: That's all, Mr. Enge.

Cross-Examination

By Mr. Winter:

Q. Mr. Enge, if I understand you correctly, just

(Testimony of Arthur Enge.)

as soon as a salesman or a broker obtains an earnest money receipt, you establish an escrow account on your books in the name of the seller and purchaser, do you not? A. That's right.

Q. And there would be no distinction, up to that point, whether it was a salesman making the sale, or a broker making the same, is there?

A. No, sir.

Q. All right. Just as soon as that transaction is completed, if the salesman makes the sale and it happens that it's on his last pay day, then he is given a check for that additional amount and the profit to Henry Broderick goes over to profit and loss account?

A. That's not exactly right, sir.

Q. Well, he gets paid—the salesman gets paid that very [79] same day, doesn't he?

A. He wouldn't be under those circumstances.

Q. And you issue a check to the salesman on that account, do you not? A. No, sir.

Q. You issue——

Mr. Eggerman: Pardon me, Counsel, I think you ought to allow the witness to finish answering your question.

The Witness: I was going to tell you on what account I did charge that commission check which the salesman——

Mr. Winter: Well, it all goes into an escrow account when the money is paid in in the first instance, does it not? A. That's right.

(Testimony of Arthur Enge.)

Q. And that's an escrow account until the transaction is consummated?

A. That's right.

Q. And when the transaction is consummated, in the case of a salesman, Broderick gets their 60% and the salesman, at the end of the month, he gets his 40%, doesn't he?

A. There's an intervening step there that I think should be pointed out.

Q. Well, the intervening step is that you run it through— [80] through the books, making it a few weeks later because it's pay—I mean a couple of weeks later because that's his pay day, is that right?

A. That isn't the whole story, sir. May I describe it?

The Court: Yes, go ahead.

The Witness: The commission goes into the profit and loss account of Henry Broderick, Inc., in its entirety; the commission, or bonus, that may be paid with respect to that—to the employee, is then given to him with his pay check, and charged not to that escrow deal, nor to that income account, but charged to another expense account, called "Compensation for Services."

Q. Well, you give the—you give the salesman your check, do you not? Henry Broderick's check?

A. It's a payroll check—a different one than the type we give to the broker.

Q. You give the broker a Henry Broderick check?

A. Not on the same account, however.

(Testimony of Arthur Enge.)

Q. Well, the account is never in the name of the broker, is it?

A. Which account is that, sir?

Q. The escrow account? A. No, sir.

Q. The broker has no authority to issue a check [81] against that account, has he?

A. No, sir.

Q. Who signs the checks—do you sign the checks? A. No, sir. I do not.

Q. Who has authority to sign those checks, only someone belonging to Henry Broderick?

A. That's right.

Q. But the salesman, he has to wait until his next pay period before he is paid his commission?

A. That's right.

Q. But the broker, he is paid his commission as soon as he—as the transaction is consummated?

A. It comes right out of the escrow deal.

Q. You don't provide for any drawing account for your brokers, do you? A. No, sir.

Q. Do they ever borrow money from the company? A. No, sir.

Q. At no time have you ever made them loans or advances to the brokers?

A. Not in my—not in my recollection of sixteen years.

Q. Do you make any advances to the salesmen that are on a salary basis?

A. It has been done, yes, sir.

Q. Of course, these salesmen, they get a commission from [82] getting leases, do they? If the

(Testimony of Arthur Enge.)

salesman goes out and gets a lease for Broderick, doesn't he get a commission on that?

A. If there is a cash commission payable to Henry Broderick, Inc., for that lease.

Q. Well, does the broker get a commission also, for making leases for Henry Broderick, if there is a commission paid on it?

A. If he makes the lease it is handled in the same way, through the escrow accounts, that he—that it would if he made a sale.

Q. You mean the first money—lease money that is paid down, goes into an escrow account, is that true?

A. The deposit goes into the escrow account and subsequent payments.

Q. And when the lease is consummated then he is paid his commission?

A. It comes right out of the same deal, the same way as in the other deal.

Q. You have a form of authority to sell real estate used by the corporation during the course of this period? A. Yes, I do, sir.

Q. Would you produce it? I would also like a copy of your form of your Earnest Money contract, and Earnest Money receipt. [83]

A. You can help me——

Q. Well, that listing form is what I wanted first, of the seller.

A. Here is an earnest money receipt form.

Q. You don't mind if I use these forms, do you

(Testimony of Arthur Enge.)

—have them identified. These are just copies or specimens.

A. I believe these are obsolete forms.

Q. I show you one that has been marked for identification Defendant's Exhibit A1. Will you just state to the Court what that is?

A. It's an authority to sell Real Estate, used in connection with our house listings.

Q. Is that a form which has been used by Broderick during the period of time here involved?

A. It is.

Q. And you secure such an authority from the prospective seller. Is that right?

A. That's right.

Q. And that is—who is that made out to—Broderick & Company?

A. Yes, Henry Broderick, Inc.

Q. Do you have a similar form with respect to a blue form? Is that the same type as the form, this one here I am showing you?

A. Mr. Winter, I'm sorry to say I don't know.

Mr. Winter: I think we better have them both marked. We will offer in evidence as Exhibit A1.

Mr. Eggerman: No objection.

The Court: It will be admitted in evidence.

(Whereupon form referred to was received in evidence and marked Defendant's Exhibit A1.)

[Defendant's Exhibit A-1 set out on page 40.]

(Testimony of Arthur Enge.)

Q. I show you what has been marked for identification Defendant's Exhibit A2, and ask you to state to the Court what that is?

A. This is also an authority to sell real estate, and I believe the difference between this and the white one is that this is an exclusive authority, whereas the white one is not exclusive.

Q. You mean A1 is the exclusive and this is——

A. The A2 is exclusive; the A1 is not exclusive.

Mr. Winter: We will offer in evidence Defendant's Exhibit A2.

Mr. Eggerman: No objection.

The Court: It will be admitted in evidence.

(Whereupon, form referred to was received in evidence and marked Defendant's Exhibit A2.)

[Defendant's Exhibit A-2 set out on page 41.]

Q. I will show you what has been marked for identification Defendant's Exhibit A3, which appears to be two sheets of paper, the white sheet——

A. Yes, sir.

Q. Will you just state to the Court what that exhibit is? [85]

A. These are the office listing forms—the white one to be used in listing properties that are not for sale with our office exclusively, and the pink one—the same form—covering an exclusive listing.

Q. Those listings are always taken in the name of Broderick and Company, are they not?

(Testimony of Arthur Enge.)

A. I don't believe they would be taken in anyone's name; if they are on this form it's just as a matter of convenience.

Q. Well, they are secured by Broderick from the salesmen or through their advertising, or some other manner, are they not, the listings?

A. Or brought in by the broker, yes.

Q. I show you what has been marked——

Mr. Winter: We will offer in evidence what has been marked Defendant's Exhibit A3.

The Court: Will you let me see that?

Mr. Eggerman: No objection.

The Court: It will be admitted in evidence.

(Whereupon white and pink forms referred to were received in evidence and marked Defendant's Exhibits A3 and A4, respectively.)

[Defendant's Exhibits A3 and A4, respectively, set out on pages 51 and 52.]

Q. Would you just state to the Court what that document is, which has been marked for identification Defendant's [86] exhibit A5?

A. There are two forms here, the yellow one is an Earnest Money Receipt, and the pink one is an Earnest Money Contract.

Q. Are those two forms which have been used by Henry Broderick during the period here involved?

A. I believe that most of our deals would emanate from a form of this kind.

(Testimony of Arthur Enge.)

Mr. Winter: We offer in evidence Defendant's Exhibit A5.

Mr. Eggerman: No objection.

The Court: It will be admitted.

(Whereupon yellow and pink forms referred to were received in evidence and marked Defendant's Exhibit A-5.)

[Defendant's Exhibit A-5 set out on pages 53 to 56.]

Q. Referring to what has been marked for identification Defendant's Exhibit A6, will you just state to the Court what that is?

A. This is also an Authority to Sell Real Estate where an exclusive—it is an exclusive authority for a certain period, which is used——

Q. By Henry Broderick, Inc., during the period here involved? A. That's right.

Mr. Winter: We will offer in evidence [87] defendant's Exhibit A6.

Mr. Eggerman: No objection.

The Witness: I would like to add just this minor point; the rate of commission which is covered in that authority has been changed a little since the period at issue, but otherwise the wording is the same.

(Whereupon document referred to was received in evidence and marked Defendant's Exhibit A6.)

[Defendant's Exhibit A6 set out on pages 57 and 58.]

(Testimony of Arthur Enge.)

Q. Mr. Enge, we served on your Counsel a notice to produce the Corporation books showing the escrow account, both for salesmen and brokers. Did you bring those books?

A. I have it right there.

Q. Would you turn to—would you find in the books a broker's account—I mean an escrow account where the property was sold by a Real Estate salesman, and the same form of account where the property was sold by a broker?

Mr. Eggerman: May I approach the witness to see.

The Court: Yes. [88]

A. On page—we haven't a page number, these are—at that time we didn't use the present system of indexing so we didn't have the number; these are listed in here in chronological order as the Earnest Money receipts come in. And on this page there's a record of an escrow account where the deal was made by an associate broker, and an Exclusive Listing Fee paid to another associate broker. On the opposite page, under a deal headed "Sloan & Kelly" is the entry covering a deal negotiated by a salesman, in which you can plainly see the difference in the handling of the commission.

Q. Well, they're both in the general ledger, aren't they?

A. They're not in the general ledger, no, sir.

Q. Isn't this your general ledger you're reading from?

A. No, sir. That's the escrow ledger.

(Testimony of Arthur Enge.)

Q. Well, they're both in the escrow ledger then?

A. That's right.

Q. Whether the sale is made by a salesman or by a broker? A. That's right.

Q. And, one further thing, Mr. Enge, you were asked to give approximately the totals of real estate sales made by admitted salesmen and the totals of real estate sales made by the so-called brokers. Did you make such a computation? [89]

A. After a good deal of hard work, we did, sir, but I'd like to ask exactly what conclusion—I mean, you're speaking of sales price total commissions or what?

Q. Well, I just want the relative values in sales made by a salesman, and the relative value in dollars and cents made by brokers?

A. I can give you percentages. I have those.

Q. Well, that's just what I want.

A. A survey of '43 and '44 sales reveals that 84% of the sales negotiated in those two years was made by real estate brokers, and that 16% for the two years——

Q. Made by Real Estate salesmen?

A. Through the efforts of real estate salesmen.

Q. Would you say that that relative percentage is being maintained about at the present time, approximately?

A. If any, the trend would be so that the brokers are making more now than at that time.

Q. In other words, more than 84%, would you say? A. Yes, sir.

(Testimony of Arthur Enge.)

Q. 84% of your sales, of Henry Broderick, were being made through the brokers.

A. That is right.

Q. And only 16% through your admitted employees? A. Yes.

Q. Oh, you said that if a person, if a salesman came to [90] work for you, you wouldn't—strike that. I think you said that if a broker started to work for you on a salary, he would have to give up his Broker's License. Is that the way I understand you?

A. That's right. That's right.

Q. Why do you say that, Mr. Enge?

A. In the essence of his Real Estate Broker's License, as I understand it, is that we may have no control over him, if he——

Q. That's your understanding; that's the reason you make that statement. Is that so?

A. Yes, sir.

Q. Mr.—You're Vice President Mr.—Your Secretary Mr. O'Brien, he has a Real Estate Broker's License, hasn't he? A. He does.

Q. And he's employed by the Company, an officer, a stockholder? A. That's right.

Q. And you're Vice President is also a broker?

A. That's right.

Q. And he sells Real Estate for the corporation account? A. Generally.

Q. Yes. Yet, unless he's an officer you think that he couldn't sell real estate for Henry Broderick if he has a broker's license?

(Testimony of Arthur Enge.)

A. I believe there's a peculiar act in the license law [91] which not only does not permit the officers who have a salesman's license, but that's required. I'm not sure of that point, but that's the reason——

Q. Well, would that be the only reason why you wouldn't hire him if he had a broker's license; you wouldn't think he'd be any less qualified, would you?

A. No, not a matter of qualification.

Q. In other words, as you understand the law, it would be otherwise where you couldn't employ him, is that what you understand?

A. We have to be able to control our employees.

Mr. Winter: That's all.

Mr. Eggerman: Just one question, Mr. Enge.

Redirect Examination

By Mr. Eggerman:

Q. You produced your escrow ledger and you, in answer to Counsel, make the statement with reference to these two accounts, one a transaction in which a broker was involved, and the second transaction where a salesman was involved, and you said you would illustrate the distinction in which they are handled. You didn't get to finish and state into the record what that difference was. Will you do so? Referring to these two accounts?

A. In the case of the Sloan to Kelly deal, which was made by a salesman, the entire commission is labled [92] Real Estate Commission—Residential, I believe, and that's the only commission shown on that particular account.

Q. And that is which account?

(Testimony of Arthur Enge.)

A. That's the one that is made by a salesman. The other account, negotiated by a Real Estate broker, shows the amount of the commission that went to the broker on that date, and I believe on the same date or right close to it, the amount that went to the profit and loss account of Henry Broderick, Inc. It is the same date, the 24th of May.

Q. Does the name of the salesman appear at all on the transaction—the escrow transaction involving the salesman? A. No, sir.

Q. His name doesn't even appear?

A. No, sir.

Q. And does the name of the broker appear in the other transaction? A. It does.

Mr. Eggerman: That's all.

Recross Examination

By Mr. Winter:

Q. What—what would show in the payment of commission to [93] the salesman?

A. The earnings record on which is kept the amount of his salary and other commissions.

Q. On the escrow account of this salesman, where does it show there that the salesman made the sale; what indicates that the salesman made the sale on that transaction?

A. The original file set up when the escrow account is started would reveal who should get the credit for the transaction.

Q. Who should be paid? A. That's right.

Q. But with respect to the brokers you show it

(Testimony of Arthur Enge.)

right on this one account because he doesn't have a salary coming, is that right?

A. It shows there because it's posted there out of the cash book when he gets his commission check.

Q. And you issue a check out of that account to the broker—— A. That's right.

Q. When it is completed?

A. His check comes directly out of that account.

Q. Well, the check of the salesman comes out of that account because it's all paid in there when the transaction is completed, isn't it?

A. The check of the salesman does not come out of that [94] account.

Q. Well, all of the money is paid into that account, is it not? A. Yes.

Q. Whether a salesman is handling it or whether a broker handles it. And then when the transaction is completed, the salesman on his next month's—or next two pay days gets paid, the same as the broker does, doesn't he?

A. He gets paid on a different form of check as bonus.

Q. Well, it's just on a different form of check——

Mr. Eggerman: We object, your Honor. It's all repetition, Counsel has gone into this two or three times.

The Court: I think it is repetition.

Mr. Winter: Well, that's all.

(Witness excused.) [95]

MELVILLE WILSON

produced as a witness on behalf of the Plaintiff, after being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Eggerman:

Q. State your name, please?

A. Melville Wilson.

Q. Where do you live? A. Seattle.

Q. And how long have you lived in Seattle?

A. Since 1905 except for three years in California.

Q. And what is your business or profession?

A. Real Estate broker.

Q. How long have you followed the real estate business? A. Since 1911.

Q. All of that in Seattle or part elsewhere?

A. Except three years in California.

Q. What kind of a license do you carry?

A. Broker's license.

Q. And who made application for that?

A. I did.

Q. And who paid for it? A. I did.

Q. Who furnished the bond and paid the bond premium? A. I did. [96]

Q. Did you make the application for the broker's license? A. Yes.

Q. Why didn't you apply for a salesman's license? A. I don't want to be a salesman.

Mr. Winter: He is calling for a conclusion of the witness.

The Court: Objection overruled.

(Testimony of Melville Wilson.)

Q. Why don't you want to be a salesman?

A. I don't want anyone to have control over me.

Q. How long have you been associated as a broker—real estate broker for the firm, Henry Broderick, Inc.? A. Since 1938.

Q. And did you sign one of these specimen contracts? A. Yes.

Q. Do you remember what date, approximately?

A. About the end of December, 1938.

Q. Who pays the expenses that you incur in your sales activities, I mean, other than the office——

A. I do.

Q. Those are the office facilities referred to in the contract? A. That's right.

Q. What, as to all the expenses except those office facilities, who pays for those?

A. I do. [97]

Q. Who pays the taxes that you have to pay to the state? A. I do.

Q. Now tell us whether or not you have had access, since you have been an associate broker, to the listings in the office of Henry Broderick, Inc.?

A. I have.

Q. Do you ever attend the sales meetings testified to by Mr. O'Brien?

A. Whenever I can conveniently.

Q. Do you have to do that? A. Oh, no.

Q. What's done at these meetings that you attend?

A. A good deal of general information pertaining to the business comes out from different brokers, the stories of sales that have been made, rec-

(Testimony of Melville Wilson.)

ords from the Journal of Commerce, new leases, new sales, new properties listed, all that information is valuable to me.

Q. Do you get any instructions or orders from anyone in Henry Broderick, Inc., then or any other time as to what you are to do? A. No.

Q. Do you keep any regular hours——

A. No.

Q. ——in the real estate business?

A. No. [98]

Q. When do you work?

A. Usually when I feel like it.

Q. You have a car you own? A. Yes.

Q. And the expenses of the car is paid for by whom? A. I pay it.

Q. Do you have an insurance policy?

A. Yes.

Q. And who pays for that? A. I do.

Q. Who is the insured? A. I am.

Q. You heard the testimony, I think, of Mr. O'Brien, with reference to brokers or at least some of them desiring to specialize in certain areas?

A. Yes.

Q. Do you specialize yourself in any area?

A. Practically so. Once in a while I step out of my specialty.

Q. Do you also specialize in the type of property? A. Yes.

Q. What is your special——

A. Commercial.

Q. Sir?

A. Commercial property—business property.

(Testimony of Melville Wilson.)

Q. At whose suggestion or wish do you specialize in commercial property? A. My own.

Q. Does that fact—would that fact prevent you or has it prevented you from making a deal in residential property if you wanted to?

A. No, I sold a house here a couple weeks ago.

Q. Are you required to make any specific calls during the day by the firm? A. No.

Q. Are you under any instructions from the firm as to what your activities shall be?

A. No, none at all.

Q. Are you required to give your entire time to the real estate business?

A. I don't give all my time to it.

Q. What business do you also follow?

A. Food brokerage.

Q. And who determines the amount of respective time that you give to the food brokerage business and the real estate brokerage business?

A. I do.

Q. Are there any other brokers, so far as you know, associated with Henry Broderick, Inc., that likewise devote some of their time to other activities? [100]

A. Yes, the ones that were mentioned by one of the other witnesses.

Q. In this trial—today?

A. In this trial, Mr. Stewart and Mr. Robbins.

Q. Now, if you don't make a sale for a period of time, do you receive anything at all from the firm of Henry Broderick, Inc.? A. No.

(Testimony of Melville Wilson.)

Q. In your experience, where are the earnest money receipts customarily signed?

A. Usually in the buyer's office, or in his home, or in his lawyer's office, once in a while——

Q. Are they necessarily along any particular form? A. No, I used many forms.

Q. Many forms. Forms other than bearing the name Henry Broderick, Inc.?

A. Yes, I've used the Washington Title Insurance Co. form.

Q. Do you remember any of those ever being signed in the office of Henry Broderick, Inc., in your experience?

A. Yes. I had one signed in there about two weeks ago—three weeks ago.

Q. Is that the rule or the exception in——

A. That's the exception.

Q. How about the closing papers. Where are they executed? [101]

A. Either in the escrow department of Henry Broderick, Inc., or in some lawyer's office, or completed in the seller's or buyer's office.

Q. Now as to the mode of approaching a buyer —that is, a prospective buyer, who determines the strategy and the psychology of your operations?

A. Well, I have to.

Q. Does anybody have—does anybody else have anything to say about it? A. No.

Q. How about advertising, do you do any advertising? A. Not very much.

(Testimony of Melville Wilson.)

Q. And when you do, who composes the advertising? A. I do.

Q. And where do you submit it? Is it entered in the papers? A. Yes.

Q. Does your name appear likewise?

A. Oh, yes.

Q. Now when you have closed the deal, as you say, you know what I mean by a closed deal?——

A. Yes.

Q. So that the monies in this escrow account which has been testified to are paid out for insurance and taxes, adjustments and so forth, and there remains in that account usually what is the last amount that is distributed? [102]

A. Well, off hand I'd say the commission would normally be although that's not always true. Your adjustments are known quantities and the commission might come out first and the other come out later.

Q. But when that commission first goes out of that escrow account, where does it go?

A. It goes to me,—mine.

Q. How much? A. 50% of it.

Q. Does Henry Broderick, Inc., get any part of it until you do? A. No.

Mr. Winter: If the Court please, I don't want to interrupt, but all these questions are leading, if the Court please, and suggestive.

The Court: Perhaps——

Q. Tell us whether or not you have ever sold

(Testimony of Melville Wilson.)

property for other real estate firms in the city while you were under this association?

A. Oh, yes, lots of times.

Q. And is the transaction any different whether between you and the plaintiff firm, as the transactions you testified to?

A. No different at all. [103]

Mr. Eggerman: I believe that's all.

Cross-Examination

By Mr. Winter:

Q. You say you've lived in Seattle since 1905, Mr. Wilson?

A. That's right.

Q. How long have you been selling real estate?

A. Selling real estate probably since the early 20's.

Q. When did you first take out your broker's license?

A. Whenever they required it. I don't know just when that was—a good many years ago.

Q. A long time before you went to work for Broderick? A. Oh, yes.

Q. Who else have you worked for—who else have you been associated with in the real estate firms in Seattle?

A. Carter, MacDonald & Co. for fifteen years.

Q. Did you have a broker's license when you were working for them? A. Yes.

Q. Whenever you go out and sell a piece of real estate for some other rival firm today, then you and Broderick split the fee, do you not?

(Testimony of Melville Wilson.)

A. I'm not sure that I understood.

Q. I say,—if you got a piece of real estate now and you [104] sold it for John Davis & Co., Davis would get the other half of the fee and you and Broderick would get half the fee?

A. That is right.

Q. You would split it with Henry Broderick while they didn't do any work on it at all?

A. Yes, sir.

Q. In these meetings every morning, you discuss listings? A. Yes.

Q. When you were given certain listings, in accordance with the contract——

A. I am given all commercial listings. They are the only ones I want.

Q. ——are you given any exclusive possession of any listings? A. Oh, no.

Q. Just the commercial listings?

A. I get all the commercial listings.

Q. Who else works on commercial listings?

A. Ross Downs, Henry Binker, Jack Sewart, Paul Evans, Connie Opperman.

Q. Well, what territory do you mostly cover?

A. Wherever I want to.

Q. Well, I mean——

A. In Seattle and out.

Q. In Seattle and out? [105]

A. Yes. Any part of the commercial district of Seattle. Business.

Q. You specialize in business or commercial sales primarily? A. Yes.

(Testimony of Melville Wilson.)

Q. You don't want to be under the Social Security Act, do you, Mr. Wilson? You don't want to be covered by it?

A. I don't know much about it—I don't want anyone bossing me.

Q. Huh?

A. I don't want anyone bossing me.

Q. Well, you know that you don't want to be under covered employment, don't you?

A. I don't want anyone bossing me, just what I said.

Q. That's the reason you say you're not working for anybody. Is that——

A. I'm a free lance. I can work when I want to, if I want to. And I want to be that way.

Q. Well, if you were under unemployment compensation, it wouldn't change your setup now would it?

A. I don't know. I don't know when a real estate broker would be unemployed—I don't know how you'd figure it out. You're kinda working under your hat most of the time. I don't know when you would become unemployed. I don't know how you'd figure it—what an unemployed [106] real estate broker would be, I don't know.

Q. Well, you'd be unemployed if you didn't have any listings, wouldn't you?

A. Well, I'd go out and get some.

Mr. Winter: I think that's all.

The Court: Now these ads that you say run in the paper, you say your name is attached to them?

The Witness: Yes.

(Testimony of Melville Wilson.)

The Court: Are they yours individually or are they sent out of Henry Broderick, Inc.?

The Witness: No, Henry Broderick, Inc., name appears, and the ads, while they are put in on a copy that I want them put in, anyone can work the property that wants to. I don't have any exclusive——

The Court: But your name appears and it's a matter of see Mr.——

The Witness: That's right. I have my name in there and the—the normal call, unless they knew someone in the office, would be to call the man that advertised—the man that's got his name in there.

The Court: Well, you don't take such an ad down to the newspapers, do you?

The Witness: Oh, no. The papers call in and get our ads.

The Court: You say "our ads", you mean——

The Witness: All the brokers—any ads that are put in by any of the brokers——

The Court: No, what I'm trying to get at—the brokers there, do they have a separate advertising, an individual advertising system or plan, or does the company—the corporation put in an ad and carry what the broker submits?

The Witness: As a normal thing, these ads are given to Mr. Boynton and the papers—the man from the newspaper comes to his desk and picks them up and takes them up and puts them in.

The Court: Then they appear under the general head of Henry Broderick, Inc.——

(Testimony of Melville Wilson.)

The Witness: The name, Henry Broderick, Inc., appears in the ad as well as my name.

The Court: Well, your name appears on the item but there may be many items in the ad?

The Witness: I never had one advertised, I don't believe, that wasn't a single ad by itself. It doesn't appear in a column of ads as my own.

The Court: And all the brokers operate that way——

The Witness: No, some of them put ads in a column or several columns.

The Court: Who pays for that? [108]

The Witness: The office pays for the advertising.

The Court: And is that charged back against the commission profits?

The Witness: No. They pay for the advertising.

The Court: But all the rest of the brokers can work on that property if they wish?

The Witness: The property is open to anyone in the office. Anyone can work on it.

The Court: Don't you find that perhaps you may have some conflict of interest?

The Witness: Oh, once in a while somebody beat my time to a sale, but next time I'll beat them, possibly. We pay no attention to that. You work until you get a sale or lose it, whichever happens to come.

The Court: As far as the buyer or seller is concerned, all documents in connection with it bear the name of the corporation, is that correct?

The Witness: Unless I happen to use a form of

(Testimony of Melville Wilson.)

the Washington Title Insurance Co. or the Puget Sound Title Insurance Co.

The Court: Well then, do you then not put the corporation's name in there at all?

The Witness: Sometimes I do, sometimes not. I use my own name if it happens to come that way. I [109] sign all earnest money receipts personally without—ah—Henry Broderick, Inc.

The Court: You don't use their——

The Witness: I use their form or any other form that is a suitable one, but I sign a personal receipt for the money. I don't say "Henry Broderick, Inc. by myself."

The Court: Do you have your business card with you?

The Witness: Yes.

The Court: I think I'm going to have that marked. While that's being——

Mr. Winter: I'd like to suggest that we have Mr. O'Brien's marked, and Mr. Ross Downs' marked at the same time.

The Court: Do you have any objection to that? While they are examining those things I want to ask you another question. When you use some form that doesn't in any way identify the corporation here as being connected with the transaction, either whether it be a transaction completed immediately or a transaction in prospect, do you account for the money immediately to the Henry Broderick, Inc.?

The Witness: Not always. Sometimes I hold it

(Testimony of Melville Wilson.)

until I've got both sides of the deal signed up. As [110] a matter of convenience, it's better for me if I don't do that. It's better to have the money put in the safe, put away in a safe place rather than have it laying loose anywhere.

The Court: Well, the owner or the prospective buyer, when you give them your address, do you give it at your home or do you give it——

The Witness: No, I give it at Henry Broderick, Incorporated.

The Court: What I'm trying to get clear—do you identify yourself as being connected with the Henry Broderick & Co. or as an independent broker.

The Witness: I am an independent broker and I tell everybody that. An independent broker associated with Henry Broderick, Incorporated.

The Court: But what money you get in the way of compensation for your services, you ultimately get from Henry Broderick & Co.

The Witness: Not always, no. I get quite a few direct from either the buyer or seller.

The Court: Then you operate different from the other members, apparently, from the testimony of the officers of the corporation.

The Witness: That might be. I get—I've had [111] quite a few checks that were made payable to me.

The Court: And you never turned them in to them at all?

The Witness: Yes, oh, yes.

The Court: Well, that's what I'm trying to get

(Testimony of Melville Wilson.)

clear. When you get your share, you get it on their check?

The Witness: Either I give them a check for the amount that is due them or give them the whole check and let them give me back part of it.

The Court: Well, if you take the former course, then, of course, you don't handle the transaction as their books disclose here.

The Witness: The money would come in to their account. What they do with it, I don't know.

The Court: Any representation you might make, I'm not meaning to imply that you did, or any controversy that grows out of your business transactions, you don't—you never represent the Henry Broderick & Co. in the transaction?

The Witness: I don't have controversies.

The Court: Oh, you're no more perfect than the average human being——

The Witness: But I've had no controversies [112] on the subject of real estate,——

The Court: Have never had any misunderstandings in your real estate——

The Witness: No, not where there is any money involved.

The Court: Either with buyer or seller, huh?

The Witness: No. Never did.

The Court: That's all.

Mr. Eggerman: That's all.

(Witness excused.)

Mr. Eggerman: The plaintiff rests. [113]

The Court: Now, I'll hear from you.

(Whereupon argument by respective counsel.)

The Court: I'll give you ten days in which to serve and file your brief—I'll give you—give you five days subsequent to the service of the brief to file a reply brief. I'll state to both counsel that this whole situation presents a rather complex question because it is in that zone—shadow zone or twilight zone between the two classifications of either master and servant or independent contractor.

We'll adjourn court until 10:00 o'clock tomorrow.

(Whereupon adjournment was taken.)

CERTIFICATE

I, Russell N. Anderson, official court reporter for the above-entitled court, do hereby certify that the foregoing is a true and correct transcript of the matters therein set out.

/s/ RUSSELL N. ANDERSON,
Official Court Reporter. [114]

[Endorsed]: No. 11596. United States Circuit Court of Appeals for the Ninth Circuit. Henry Broderick, Inc., Appellant, vs. Clark Squire, individually and as Collector of Internal Revenue for the District of Washington, Appellee. Transcript of Record. Upon Appeal from the District Court

of the United States for the Western District of Washington, Southern Division.

Filed April 24, 1947.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 11596

HENRY BRODERICK, INC.,

Appellant,

vs.

CLARK SQUIRE, individually and as Collector of Internal Revenue for the District of Washington,

Respondent.

APPELLANT'S STATEMENT OF POINTS ON WHICH IT INTENDS TO RELY ON APPEAL AND DESIGNATION OF THE RECORD DEEMED NECESSARY FOR THE CONSIDERATION THEREOF.

Comes now Appellant and, pursuant to Subdivision 6, Rule 19, of the Rules of the United States Circuit Court of Appeals for the Ninth Circuit,

herewith adopts the statement of points filed in the District Court upon which Appellant intends to rely on appeal, and herewith designates the entire transcript of record as prepared and certified by the Clerk of the District Court, to be printed for purposes of this appeal.

Dated this 23rd day of April, 1947.

/s/ D. G. EGGERMAN,
/s/ JOSEPH J. LANZA,
EGGERMAN, ROSLING & WILLIAMS,
Attorneys for Appellant.

Service of the foregoing, by receipt of true copy thereof, is hereby acknowledged this 23rd day of April, 1947.

/s/ J. CHARLES DENNIS, (GM)
U. S. District Attorney,
Attorney for Respondent.

[Endorsed]: Filed April 24, 1947.

No. 11596

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

HENRY BRODERICK, INC., *Appellant*,

vs.

CLARK SQUIRE, individually and as Collector of Internal Revenue for the District of Washington, *Appellee*.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

BRIEF OF APPELLANT

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THE ARGUS PRESS, SEATTLE

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UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

BRIEF OF APPELLANT

NATURE OF ACTION

This is a suit in three causes of action for the recovery of taxes assessed by the Government and paid under protest by appellant under the Federal Insurance Contributions Act (Chap. 9A of the Internal Revenue Code) for the period from April 1, 1943 to March 31, 1945 and under the Federal Unemployment Tax Act (Chap. 9C of the Internal Revenue Code) for the years 1943 and 1944.

JURISDICTION

District Court

Jurisdiction of this action was conferred on the District Court by Section 24(20) of the Judicial Code.

Taxes in the sum of $1,938.63 were assessed under the Federal Insurance Contributions Act for the period from April 1, 1943 to March 31, 1945 (Tr. 29).

Taxes in the sum of $1,042.00 for 1943, and the sum of $1,380.05 for 1944 were assessed under the Federal Unemployment Tax Act (Tr. 29).

All three sums were paid under protest by appellant on August 4, 1945 (Tr. 29, 30).

On August 11, 1945, which was within 4 years of such payment as provided by Section 3313 of the Internal Revenue Code, claims for refund of the taxes so paid were filed with the Collector of Internal Revenue (Tr. 30).

Under date of January 2, 1946, the Commissioner of Internal Revenue notified appellant that its claims for refund were disallowed (Tr. 30).

This action was commenced on February 13, 1946, which was within two years of such disallowance, as provided by Section 3772(a)(2) of the Internal Revenue Code (Tr. 30).

Circuit Court

Jurisdiction of this court is invoked by virtue of Section 128(a) of the Judicial Code.

Judgment of the District Court dismissing the action with prejudice and with costs was entered on January 27, 1947 (Tr. 32, 33).

Notice of Appeal was filed March 17, 1947, which was within three months from the date of entry thereof, as required by Section 240-8(c) of the Judicial Code (Tr. 33, 34).

Cost Bond on Appeal in the sum of $250.00 was filed with the Notice of Appeal on March 17, 1947, pursuant to Rule 73(c) of the Rules of Civil Procedure (Tr. 34-37).

Statement of Points on which Appellant Intends to Rely on Appeal was served March 14, 1947, and filed in the District Court on March 17, 1947, as required by Rule 75(d) of the Rules of Civil Procedure (Tr. 37-48).

Appellant's Designation of the Record, Proceedings and Evidence to be contained in the Record on Appeal was served on March 21, 1947 and filed with the District Court on March 24, 1947, as required by Rule 75(a) of the Rules of Civil Procedure (Tr. 38-40). Appellee's Designation of Additional Portions of the Record and Proceedings to be Contained on the Record on Appeal was served on March 25, 1947 and filed with the District Court on March 29, 1947 as permitted by Rule 75(a) of the Rules of Civil Procedure (Tr. 41-43).

The Record on Appeal was filed with this court on April 24, 1947 which was within 40 days from the date of the Notice of Appeal as required by Rule 73(g) of the Rules of Civil Procedure (Tr. 145-146).

Appellant's Statement of Points on which it Intends to Rely on Appeal and Designation of the Record Deemed Necessary for the Consideration Thereof was filed in this court on April 24, 1947 as required by Rule 19, par. 6, of the Rules of the United States Circuit Court of Appeals for the 9th Circuit (Tr. 146-147).

Copies of printed record was received by appellant on June 19, 1947, and appellant's brief is required to be served and filed within 30 days thereof, pursuant to Rule 20, par. 1, of the Rules of the United States Circuit Court of Appeals for the 9th Circuit.

QUESTION INVOLVED

Does the contract and operating arrangement between Henry Broderick, Inc., and the real estate brokers give rise to an employer-employee relationship within the meaning of the Federal Unemployment and Federal Insurance Tax Acts, and the regulations issued thereunder.

The District Court answered the question in the affirmative.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are:

Chapter 9A Internal Revenue Code (26 U.S. C.A., Secs. 1400-1432) commonly known as the Federal Insurance Contributions Act;

Chapter 9C Internal Revenue Code (26 U.S. C.A., Secs. 1600-1611) commonly known as the Federal Unemployment Tax Act;

Regulation 106, Sec. 402.204 (pertaining to the Federal Insurance Contributions Act);

Regulation 107, Sec. 403.204 (pertaining to the Federal Unemployment Tax Act).

Statutes

Neither of the two Federal statutes referred to contain a definition of "employer" or "employee."

During the tax periods herein involved, both statutes contained the same definition with respect to "wages" and "employment" as follows:

Wages

> "The term 'wages' means all remuneration for employment, * * * (Internal Revenue Code, Secs. 1426 and 1607(b)."

Employment

> "The term 'employment' means any service * * * of whatever nature, performed after December 31, 1939, by an employee for the person employing him * * * except * * *."

Regulations

Section 403.204 of Regulation 107 and Section 402.204 of Regulation 106 read the same and provide as follows:

> "Who are employees.—Every individual is an employee if the relationship between him and the person for whom services are performed has the relationship of employer and employee.
>
> "Generally such relationship exists when the person for whim services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to *what* shall be done but *how* it shall be done. In

this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer, but not necessarily present in every case, are the furnishing of tools and the furnishing of a place to work, to the individual who performs the services. In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is an independent contractor. An individual performing services as an independent contractor is not as to such services an employee.

"Generally, physicians, lawyers, dentists, veterinrians, contractors, subcontractors, public stenographers, auctioneers, and others who follow an independent trade, business, or profession, in which they offer their services to the public, are independent contractors and not employees.

"Whether the relationship of employer and employee exists will in doubtful cases be determined upon an examination of the particular facts of each case.

"If the relationship of employer and employee exists, the designation or description of the relationship by the parties as anything other than that of employer and employee is immaterial. Thus, if such relationship exists, it is of no consequence that the employee is designated as a partner, co-adventurer, agent, or independent contractor.

"The measurement, method, or designation of compensation is also immaterial, if the relationship of employer and employee in fact exists.

"No distinction is made between classes or grades of employees. Thus, superintendents, managers, and other superior employees are employees. An officer of a corporation is an employee of the corporation but a director is not. A director may be an employee of the corporation, however, if he performs services for the corporation other than those required by attendance at and participation in meetings of the board of directors.

"Although an individual may be an employee under this section, his services may be of such a nature, or performed under such circumstances, as not to constitute employment within the meaning of the Act."

STATEMENT OF THE CASE

The evidence adduced by appellant is not disputed. It consists of the testimony of three of its officers and one of the brokers whose relationship is involved herein. Defendants offered no evidence except certain exhibits which were admitted during cross-examination of appellant's witnesses. The facts, as thus disclosed, may be briefly summarized as follows:

Appellant is a corporation duly licensed as a real estate broker under the laws of the State of Washington, and has engaged in that business since 1911 (Tr. 65).

Appellant's business is divided into three separate departments known as the Property Management De-

partment, Real Estate Department, and Insurance Department (Tr. 76).

In addition to its relations with the real estate brokers involved herein, appellant employs eleven or twelve real estate salesmen who work in the Property Management Department (Tr. 66, 77).

These salesmen hold *salesmen's* real estate licenses, as distinguished from *brokers'* licenses, which are paid for by appellant, including the premium on their bonds (Tr. 66).

These salesmen are *required* to attend daily sales meetings in appellant's office which are presided over by the Rental Manager (Tr. 66). At these meetings, the salesmen report on the assignments they were given the day before, and upon their activities thereon, and are also given assignments for the ensuing day (Tr. 67).

Complete supervision and control is exercised by appellant over these salesmen and they are required to keep regular office hours (Tr. 67).

They devote the major portion of their time to work in connection with the management of property, and approximately 25% to the making of sales and property management leases (Tr. 68, 112).

Entire control is exercised over them, however, as to their sales or lease activities, and they work only on specific assignments given to them by the Manager. They are told what prospects to see, and are required to report back to the head of the department as to the result of their interviews (Tr. 68).

They are on a regular stipulated salary which is

paid twice a month (Tr. 68, 111). However, if they are successful in negotiating a sale or lease, they receive in addition to their salary, 40% of the total commission that is earned by appellant. This commission is paid to them on their regular salary day (Tr. 69, 82, 113). If in the meantime, appellant has received the commission from a sale or lease, it is deposited in its profit and loss account (Tr. 69, 112, 115, 118). Appellant takes care of all of the sales expense of these salesmen, including their license and bond premiums (Tr. 69, 111, 113).

No issue is involved herein as to such salesmen, as they are admittedly employees covered by the Acts. The foregoing evidence, however, was adduced to emphasize the contrast between appellant's relations with its salesmen, and its relations with the real estate brokers involved in this case.

The brokers associated with appellant, and whose status is the subject of inquiry herein, work out of the Real Estate Department (Tr. 77). Prior to 1937 or 1938, the relationship between them was not evidenced by any written contract (Tr. 70, 71). However, in 1937 or 1938, written contracts were entered into, sample of which has been admitted in evidence as Plaintiff's Exhibit 1 (Tr. 43-47). This agreement was in use during all the periods here involved (Tr. 70). There was no difference, however, between the operations of the brokers under their oral agreement and under the written contract (Tr. 71).

Under this written agreement, both parties warrant that they are licensed real estate brokers in the State

of Washington, and that each will keep his license as broker in full force and effect, and will pay all fees and taxes arising out of his activities as a broker (Tr. 43). Under this agreement, appellant agrees to furnish the broker with a desk, telephone, switchboard service, and necessary stenographic service (Tr. 44).

The agreement also provides that appellant will make available to the broker all current listings of the office, except such as it may find expedient to place exclusively in the temporary possession of some other broker (Tr. 44).

The broker agrees to exert his best efforts to sell, lease or rent any real estate listed with appellant, and to solicit additional listings and customers in the name of appellant (Tr. 45).

The parties to the contract likewise agree to divide the commission realized on deals in which the broker has participated, upon an equal basis (Tr. 45).

Under the contract, appellant is under no obligation to make advances for expenses or commissions, and the broker agrees to furnish transportation for prospects at his own expense, and to pay his own entertainment expense, club dues, and any other expense incident to his business as a real estate broker (Tr. 46). The broker is to have entire discretion as to the handling of "leads" and prospects and as to his conduct as broker, and as to the means of securing listings, handling prospects, and consummating deals, free from control of appellant as to manner and method of conducting his services as a real estate broker, it being the express intent that the broker is an "inde-

pendent contractor, and not a servant, employee, joint adventurer or partner" of appellant (Tr. 46, 47).

Under paragraph 9, the agreement is terminable by either party at any time upon notice (Tr. 47).

The testimony as to the method of operation between appellant and the associate brokers involved herein is as follows:

These brokers are selected on the basis of experience and financial responsibility (Tr. 88, 101). Many of them were engaged in the real estate business prior to associating with appellant (Tr. 86, 87, 131, 137). They are free to, and in fact, some of them actually engage in other business activities (Tr. 89, 90, 91, 134).

These brokers are not required to keep any regular office hours, or maintain any definite routine, and are free to put in as much time as they desire (Tr. 72, 89, 91, 132, 133).

Most of the work of these brokers is done outside of the office of appellant. The earnest money receipts are signed usually in the purchaser's home or place of business, and closing details are worked out in an attorney's office or in an escrow company's office. A great deal of their work is transacted in their own home, where they receive phone calls and carry on some of their correspondence with respect to the real estate business (Tr. 72, 91, 92, 94, 116, 135).

They determine their own strategy and procedure for effecting a sale without any supervision whatsoever by appellant (Tr. 72, 88, 90, 92, 135).

The broker is not limited to any specific area, nor is there any limitation upon the character of the property which he may sell. If there is any preference in regard thereto, it is of the broker's own choosing (Tr. 90, 91, 99, 134, 138).

They carry a real estate broker's license, which is obtained upon their own application, at their own expense, including the bond premiums. They own their own cars, and take care of their own expenses, such as repairs, gas and insurance (Tr. 87, 97, 114, 131, 132, 133).

They do not carry any insignia of appellant on their automobiles (Tr. 103).

Meetings of these brokers are held, but there is no compulsion upon them to attend. Employee salesmen, however, are not permitted to attend brokers' meetings which are held in the Real Estate Department. No progress reports are required (Tr. 74, 86, 95, 100, 132).

Listings come to appellant either from advertising or from the brokers themselves (Tr. 77, 88). Occasionally, a broker secures a listing and gets an earnest money deposit before the listing gets to appellant (Tr. 85, 89). The listings obtained are taken in appellant's name (Tr. 100). An analysis of each listing is given to each broker, and all of them are free to work on the property. The first one who brings in an earnest money deposit, however, shares the commission with appellant if the deal is ultimately closed (Tr. 104, 107).

When an earnest money deposit is received, it is

placed in an escrow account with appellant, and the commission is divided between appellant and the broker *simultaneously* with the closing of the deal (where for the first time it is earned). At that time appellant deposits its half of the commission for the first time in its profit and loss account (Tr. 73, 82, 115). The broker receives no drawing account and is paid only a portion of the gross commission earned upon the consummation of the transaction in which he participated (Tr. 119).

If a broker is successful in getting an exclusive listing for appellant, he receives a commission whether or not he is the eventual selling broker. This listing commission comes out of the gross commission and is charged partly to appellant and partly from the share that goes to the selling broker. If, however, the broker who brings in the listing also makes the sale, the commission is divided equally (Tr. 93).

A broker's name and his residential phone number frequently appear in the advertising run by appellant. However, the fact that his name appears in an ad, does not prevent another broker associated with appellant from attempting to sell the property advertised (Tr. 91, 136, 139, 141).

Prospects who may call upon appellant's office, however, will be referred to the broker who is best qualified to handle that particular piece of property (Tr. 108).

Appellant furnishes at its own expense the brokers with stenographic and switchboard service, stationery and cards (Tr. 96).

The price at which the broker can sell the property is determined as a result of negotiations between the buyer and the seller (Tr. 94).

On July 30, 1945, appellant was notified that an assessment for additional Internal Revenue taxes for the period from April 1, 1943, to March 31, 1945, was being made on the ground that said broker salesmen were employees of appellant and taxable under the Federal Insurance Contributions Act, and demand was made upon it that the tax liability in the sum of $1,938.63 be paid within ten days thereof. In accordance with said demand, appellant paid this sum under protest on August 4, 1945 (Tr. 29).

Likewise, on July 26, 1945, appellant was notified that an assessment for additional Internal Revenue taxes for the year 1943 in the sum of $1,042.00, and for the year 1944 in the sum of $1,380.05 was being made on the ground that said broker salesmen were employees of appellant and taxable under the Federal Unemployment Tax Act, and demand was made upon it that said sums be paid within ten days thereof. In accordance with this demand, the sums were paid by appellant under protest on August 4, 1945 (Tr. 29, 30).

On August 11, 1945, appellant duly filed with the appellee, Collector of Internal Revenue for the District of Washington, for consideration of the Commissioner of Internal Revenue, its claims for refund for the amounts thus paid (Tr. 30).

Under date of January 2, 1946, the Commissioner of Internal Revenue notified appellant that its claims

for refund were disallowed. This action was timely brought on February 13, 1946 (Tr. 30).

Trial of the action was had on November 12, 1946 (Tr. 25, 32), and on December 11, 1946, the District Court filed a written memorandum opinion concluding that these brokers were employees of appellant and therefore the taxes levied were proper (Tr. 15-24).

On January 27, 1947, the District Court, in accordance with its written memorandum opinion, entered Findings of Fact and Conclusions of Law (Tr. 25-31) and Judgment dismissing appellant's complaint with prejudice and with costs (Tr. 32-33). This appeal followed.

SPECIFICATION OF ERRORS

The District Court erred in concluding from the undisputed facts that the relationship between appellant and the brokers was that of employer and employee within the meaning of the Federal Insurance Contributions Act and Federal Unemployment Tax Act, and that therefore the taxes were legally assessed and collected.

SUMMARY OF ARGUMENT

1. This court is not bound by the findings and conclusions of the District Court since there is no dispute on the facts.

2. Application of the standards announced by the U. S. Supreme Court in the *Silk* and *Greyvan* cases requires a conclusion that the employer-employee re-

lationship does not exist between appellant and the brokers:

(A) Absence of control over the brokers.

(B) Brokers' opportunities for profit and loss as dependent upon their own initiative and judgment.

(C) Brokers' investment in facilities.

(D) Lack of permanency in relation.

(E) Skill required on the part of the brokers.

(F) Other factors:

(1) Brokers have a proprietary interest in the commissions earned.

(2) Source of payment is from property owner and not from appellant.

3. The decisions of the overwhelming majority of state courts have denied the existence of an employer-employee relationship under state unemployment compensation acts to real estate brokers as well as real estate salesmen working under circumstances identical to those at bar.

ARGUMENT

This Court Is Not Bound By Findings and Conclusions of District Court.

In this case, the facts are not in dispute. The problem is one of construction and application of the taxing statutes. In such situations, the findings of the trial court are not conclusive and the appellate court is free to review the facts and to substitute its own judgment untrammelled by the findings and conclusions of the District Court.

United States v. Anderson (C.C.A. 7) 108 F.(2d) 475, 479;

United States v. Mitchell (C.C.A. 8) 104 F. (2d) 343;

Wigginton v. Order of U.C.T. of America (C.C.A. 7) 126 F.(2d) 659.

II.

Discussion of Standards Laid Down in the Silk and Greyvan Cases.

The United States Supreme Court, on June 16, 1947, announced certain standards for determining the application of the two Acts in question to individuals claimed to be independent contractors. These rules appear in a decision rendered by the court in *United States v. Silk*, and *Harrison v. Greyvan Lines, Inc.*, 91 Law Ed. Adv. op. 1335.

The court states that all factors must be considered in determining whether an individual rendering services is an employee or an independent contractor. Among such factors to be considered are (a) degrees

of control; (b) opportunities for profit or loss; (c) investment in facilities; (d) permanency of relation, and (e) skill required in the claimed independent operation.

However, the court points out that no one of these factors is controlling "nor is the list complete."

An analysis of the facts involved in the *Silk* and *Greyvan* cases will, we believe, prove helpful to this court in determining the question involved.

The taxpayers there were the Albert Silk Coal Co. and Greyvan Lines, Inc. Both companies sued to recover sums exacted from them by the Commissioner of Internal Revenue as employment taxes on employers under the Social Security Act. In both instances, the taxes were collected on assessments made administratively by the Commissioner because he concluded that the persons involved were employees.

Silk sold coal at retail. His premises consisted of two buildings, one was the office and the other a gathering place for workers, railroad tracks upon which carloads of coal were delivered by the railroad, and bins for the different types of coal. He paid those who worked as unloaders an agreed price per ton to unload coal from the railroad cars. These men would come to the yard when and as they pleased and were assigned a car to unload and a place to put the coal. They furnished their own tools which consisted of picks and shovels, worked when they wished and worked for others at will.

As to this type of workers, the Supreme Court held them to be employees and of the group that the Social

Security Act "was intended to aid." In arriving at this conclusion, the court pointed out that they provided only "simple tools," and that they had no opportunity to gain or lose except from the work of their hands and these tools. Furthermore, Silk was in a position to exercise all necessary supervision over their "simple tasks."

The next group of workers in the *Silk* case involved certain truck drivers who delivered the coal to the customer. Silk owned no trucks himself, but contracted with certain individuals, who owned their own trucks, to deliver the coal at a uniform price per ton. *The remuneration was paid to the trucker by Silk out of the price he received for the coal from the customer.*

When an order for coal was received in the company office, a bell was rung in the building used by the truckers. The truckers had voluntarily adopted a call list upon which their names came up in turn, and the top man on the list was given an opportunity to deliver the coal ordered.

The truckers were not instructed how to do their jobs, but were merely given a ticket telling them where the coal was to be delivered and whether the charge was to be collected or not.

Any damage caused by the truckers was paid by the company. The District Court found that the truckers could, and often did, refuse to make a delivery without penalty. Further, the court found that the truckers could come and go as they pleased and frequently did leave the premises without permission. They also could and did haul for others when they pleased.

They paid all the expenses of operati
and furnished extra help necessary to
the coal and all equipment except th
bins. No record was kept of their time
paid after each trip, at the end of th
end of the week, as they might reque

Both the District and the Circuit c
the truckers were independent contr
lowed recovery of the taxes paid. The
agreed with the decisions below that
rangement left the driver-owners so m
ity they must be held to be independe

The status of truckers was also i
Greyvan case. The taxpayer there was
rier by motor truck, operating throug
States and parts of Canada, carrying
hold furniture.

While its principal office was in Ch
tained agencies to solicit business in
larger cities in the areas it served,
contracted to move goods. It contract
men under which the truckmen were r
exclusively for Greyvan, and to fur

due the company from shippers or consignees a
turn in such moneys at the office to which the
ported after delivering a shipment, to post bond
cash deposits with the company pending a fina
tlement of accounts. They were further requir
personally drive their trucks at all times or be pr
on the truck when a competent relief driver was
ing (except in emergencies, when a substitute
be employed with the approval of the company)
to follow all rules, regulations, and instructions
company.

All contracts or bills of lading for the shipme
goods were to be between the company and the sh
The company's instructions covered directions t
truckmen as to where and when to load freig
freight was tendered the truckmen, they were
obligation to notify the company so that it
complete the contract for shipment in its own

As remuneration, the truckmen received fro
company a percentage of the tariff charged b
company varying between 50% and 52% and a
up to 3% for satisfactory performance of the se

The contract was terminable at any time by

Cargo insurance was carried by the company. All permits, certificates and franchises "necessary to the operation of the vehicle in the service of the company as a motor carrier under any federal or state law" were to be obtained *at the company's expense.*

A manual of instructions was given by the company to the truckmen. This manual purported to regulate in detail the conduct of the truckmen in the performance of their duties. However, a company official testified that the manual was impractical and that no attempt was made to enforce it.

The company also agreed with the union that any truckman must first be a member of the union, and that grievances would be referred to representatives of the company and the union.

The company also had some trucks driven by truckmen who were admittedly company employees. Operations by the company, however, under the two systems were carried out in the same manner.

Both the District Court and the Circuit Court of Appeals held that the truckmen were independent contractors, and the Supreme Court affirmed their status as such.

The Supreme Court, after discussing the purpose of the Social Security Act, adopts the view that application of the social security legislation should follow the same rule that was applied to the National Labor Relations Act in *National Labor Relations Board v. Hearst Publications*, 322 U.S. 111, wherein the court approved the statement of the National Labor Relations Board that "the primary consideration in the

determination of the applicability of the statutory definition is whether effectuation of the declared policy and purposes of the act comprehend securing to the individual the rights guaranteed and protection afforded by the act."

The court, however, lays down the following important admonition:

> "This, of course, does not leave courts free to determine the employer-employee relationship without regard to the provisions of the act. The taxpayer must be an 'employer' and the man who receives wages an 'employee.' There is no indication that Congress intended to change normal business relationships through which one business organization obtains the services of another to perform a portion of production or distribution."

Using the *Silk* and *Greyvan* cases, therefore, as a guide, the conclusion is inescapable that the brokers in the case at bar are clearly not "employees" or appellant the "employer" within the meaning of the Social Security Act. In fact, the truckmen in the *Greyvan* case presented a much stronger case for the government from the standpoint of control, initiative, judgment and energy, than do the brokers in the case at bar. It is to be noted particularly that the truckmen were required to paint the designation "Greyvan Lines" on their trucks, and to report their positions at intervals to company dispatchers who issued orders for their movements. They were likewise required to follow all rules, regulations and instructions of the company.

Application of the several tests announced by the

court likewise conclusively demonstrates the non-existence of the necessary employer-employee relationship between the parties involved in the case at bar.

(A) Degrees of Control

The brokers in question are required by the agreement, and in practice actually are licensed as real estate *brokers* by the State of Washington under a statute which clearly recognizes the broker as having an independent business "free from the direction, control, or management" of another. Remington's Revised Statutes of Washington (1941 Supp.) Sec. 8340-25(1).

The agreement states that the broker shall be "free from control" of appellant "as to the manner and method" of conducting his services as a broker (Tr. 47).

In actual practice, there is no requirement that the brokers attend sales meetings, make reports, keep regular office hours, maintain any definite routine, or make any specific calls during the day. On the contrary, they are free to come and go as they please, put in as much time as they see fit, determine their own strategy and procedure for effecting a sale, without restriction as to territory or character of property to be sold. They are not required to give their entire time to the business of selling real estate, but may and some do engage in independent businesses.

(B) Opportunities for Profit and Loss

The opportunity for profit rests entirely on their own initiative, judgment and energy. They stand to profit if their efforts are successful in consummating a sale. If they are not successful in obtaining a purchaser for the property, they get nothing for their efforts despite the time and expense expended. As will be seen from the list of their earnings (Tr. 10) no two brokers earned the same, although each presumably was afforded an equal opportunity to sell the same properties. Their endeavors may be likened to a foot race, wherein their individual talents, skill and energy, determine the winner. They have no drawing accounts and receive no remuneration whatsoever for their efforts unless a sale is consummated as a result of their activities.

(C) Investment in Facilities

The broker owns his own car and pays his own expenses such as insurance, repairs, oil, gasoline, license fees, business and occupation taxes, broker's license and bond premiums. They are, like the driver-owners in the *Silk* and *Greyvan* cases, "small businessmen."

(D) Permanency of Relation

Like the truckers involved in the *Silk* and *Greyvan* cases, the contractual relationship herein was terminable at any time by either party.

(E) Skill Required

In order to qualify for a broker's license, an elementary understanding of the principles of real es-

tate conveyancing, the general purposes and general legal effects of deeds, mortgages, land contracts of sale, exchanges, rental and option agreements, and leases, of the elementary principles of land economics and appraisals, and an elementary understanding of the obligations between principal and agent, of the principles of real estate practice and the canons of business ethics pertaining thereto, is required. Remington's Revised Statutes of Washington (1941 Supp.) Sec. 8340-35.

These brokers are selected on the basis of experience and financial responsibility. Most of them were engaged in the real estate business prior to their association with appellant. Their work is not of a routine or simple nature. Individual personality, "approach," psychology, salesmanship, imagination, initiative, judgment, and energy play a vital part in their success.

(F) Other Factors

The Supreme Court in the *Silk* and *Greyvan* cases recognized that other factors may be present in determining coverage under the Social Security Act. The following additional factors should therefore be considered:

1. *The broker has a proprietary interest in the commission that is earned.* Thus, the half of the commission to which the broker is entitled upon completion of the deal, never was intended to and never does become the property of appellant. Appellant is a trustee, and is required to account for it to the broker immediately upon consummation of the sale, when for the first time it is earned.

This view was adopted by the Third Circuit Court of Appeals in *Koehler v. Myers*, 21 F.(2d) 596, wherein the court held that the receiver of a real estate broker (Tucker) in possession of the commission money prior to division with the salesman, was a trustee to the extent of one-half of the commission for the benefit of the salesman (Myers). In that case, the salesman sold certain property that was listed with a real estate broker. Before the commission was paid, the real estate broker became insolvent and a receiver was appointed. The owner of the property refused to pay the commission, and the receiver brought suit and recovered judgment for the claimed commission.

The salesman then petitioned to be allowed priority over the common creditors as to his portion of the commission, contending that he was entitled to one-half of the commission as his own individual property. The receiver contended that the entire commission belonged to the insolvent broker, and that the salesman was merely a general creditor.

The District Court sustained the position of the salesman and ordered the receiver to pay one-half of the commission to the salesman. On appeal, the Circuit Court affirmed, and quoted the following statement of the District Court with approval:

> " 'Obviously, the relation between the parties is not one of employer and employee. The corporation assumed no obligations to Myers other than to furnish him office room. Myers assumed no obligation as to the corporation other than to share with them such commissions as might be earned as a result of his efforts. * * * As to

> Myers' moiety, the receiver must be deemed in equity as a trustee for Myers.'
>
> "'* * * He and Tucker were in a joint enterprise. Tucker was to secure the listing of the properties furnish 'desk and telephone and stenographic service' and the general office facilities required by a salesman, while Myers, on his part, was to negotiate sales for the properties listed in the office of Tucker."

The receiver also contended that the New Jersey statute defining a real estate salesman as a person who is "employed by a licensed real estate broker" included the work of Myers and showed that he was in the employ of Tucker. Answering this contention, the court said:

> "But that act does not create a new definition of employer and employee. A real estate broker may employ a real estate salesman and pay him in commissions, but at the same time a real estate broker and a salesman may enter into a joint enterprise, the broker furnishing the office and equipment generally, and the salesman supplying the active service in selling real estate. It was not a case of selling real estate 'for others,' but for themselves and dividing equally the commission. When the property was sold, one-half the commission belonged to Myers, was his individual property."

That the real estate broker had a "proprietary interest" in the commission, as held in the *Koehler* case has also been announced, under similar or analagous facts in *Yearwood v. U.S.* (D.C. La. 1944) 55 F. Supp. 295 and 299; *Guaranty Mortgage Co. v. Bryant,* 179 Tenn. 579, 168 S.W.(2d) 182 (1943); *Henry Broderick Inc.*

v. Riley, 22 Wn.(2d) 760, 157 P.(2d) 954 (1945), and *Realty Mortgage & S. Co. v. Oklahoma Employment Security Commission*, 169 P.(2d) 761 (Okla., 1945).

Obviously if the broker's interest in a specific commission is a *proprietary one*, such share *cannot* be considered "wages of an 'employee'."

2. The commission when and if earned is drawn from an escrow or trust account and simultaneously divided between appellant and the broker. Until the division is made, no part of the same ever becomes the property of the appellant or enters its profit and loss account. In fact under the evidence no part of the commission can become the property of either until it is earned by the consummation of the deal whereupon it is simultaneously divided. The source of the commission that may be earned by the broker emanates from the property owner—and not from appellant.

These additional factors are determinative of the non-existence of the employer-employee relationship, and have been so considered in the numerous cases involving the status of real estate brokers under the various state unemployment acts about to be discussed.

III.

The Overwhelming Majority of State Courts Have Denied the Existence of the Employer-Employee Relationship

The highest appellate courts of the states of Missouri, New York, Oklahoma, Tennessee, and Washington, under identical facts have denied the application of the state unemployment acts to real estate brokers and salesmen. The state of California can likewise

be added to this list, although the cases emanating from that state do not involve facts identical to the case at bar. These cases will be discussed in chronological order.

In *A. J. Meyer v. Unemployment Compensation Commission*, 348 Mo. 147, 152 S.W.(2d) 184 (1941), the Supreme Court of Missouri, upon identical facts (except as to the presence of a written contract) held that there was no substantial evidence to support the ruling by the Commission that a real estate salesman was in employment within the meaning of the Missouri Unemployment Compensation Act, and that such a salesman was in effect an independent contractor.

The same result on identical facts was reached by the New York Court of Appeals in *In re Wilson-Sullivan Co.*, 289 N.Y. 110, 44 N.E.(2d) 387 (1942).

The Supreme Court of Tennessee, in *Guaranty Mortgage Co. v. Bryant*, 179 Tenn. 579, 168 S.W.(2d) 182 (1943), arrived at the same conclusion with respect to the Tennessee Unemployment Compensation Act, commenting as follows:

> "The arrangement between the parties amounted to nothing more than that the salesmen were furnished free office space, telephone, etc., for which complainant received one-half the commission earned and actually collected on sales made by the salesmen, complainant closing the deal. Commissions were not paid by complainant, but by the parties to the sale. Complainant did not pay, or promise to pay, any wages or commission to the salesmen. The situation was that the salesmen paid one-half of the commissions earned

by them to complainant, rather than that complainant was paying them commissions."

The identical facts herein were before the Supreme Court of the State of Washington in *Henry Broderick, Inc. v. Riley*, 22 Wn.(2d) 760, 157 P.(2d) 954 (1945), wherein it was unsuccessfully urged that the relation between appellant and these same brokers was that of employer and employee within the Washington Unemployment Compensation Act. The court, in holding that the evidence wholly failed to show that these brokers were in the "employment" of appellant said:

> "In the instant case, an association was formed between appellant and these brokers for the mutual benefit of both. What term the parties may have applied to the relationship is not binding upon us. Appellant contributed to such enterprise certain office facilities, and the brokers contributed their services. Each party, for his contribution to the enterprise, was to receive half of the commission coming in from the sale of real estate as the result of their joint efforts. *The half of the commission to which the broker was entitled upon completion of the deal, never was intended to and never did become the property of the appellant. It was the property of the broker from the time it was earned, and was so considered by both parties.* Appellant never agreed to pay and never did pay the brokers any wages or remuneration as those terms are defined in the statute, and was not in fact an employer of these brokers under the Act, nor was the contract here involved a contract of hire." (Italics ours)

The same conclusion was reached by the Washington Court in two other real estate cases, namely, *In re*

Coppage, 22 Wn.(2d) 802, 157 P.(2d) 977, and *Curtis v. Riley*, 22 Wn.(2d) 951, 157 P.(2d) 975.

The Supreme Court of Oklahoma, in *Realty Mortgage & S. Co. v. Oklahoma Employment Security Commission*, 169 P.(2d) 761 (1945), in a well-considered opinion likewise held that real estate salesmen were not in "employment" within the meaning of the Oklahoma unemployment statute, adopting in effect the joint venture theory of the Washington court (*Henry Broderick, Inc. v. Riley*, 22 Wn.(2d) 760, 157 P.(2d) 954), and of the Third Circuit Court of Appeals (*Koehler v. Myers*, 21 F.(2d) 596). The Oklahoma court after an exhaustive review of the authorities said:

> "In the instant case there is no obligation on the salesmen to perform any service for plaintiff, nor is plaintiff obligated to pay them for any service rendered. There is no contract of hire, express or implied. Rather, the association of plaintiff and the salesmen is in the nature of a joint venture, in which each party to the arrangement makes certain contributions and performs certain services in order to produce a result mutually profitable to them. Plaintiff contributes its offices, office equipment and personnel, and such information as it may have, or such real estate listings as it may receive, and its efforts to close deals made by the salesmen, and to collect the commission. The salesmen contribute their time and efforts, the expense of seeking out prospective purchasers or borrowers, and procuring from them contracts for the purchase of real estate or applications for loans. Each apparently considers that the arrangement is to their advantage. If it develops that it is not, either may ter-

minate it at any time. Plaintiff is no more the employer of the salesmen than it is their employee. Neither is in the employment of the other. Each performs his function, and receives his remuneration, not from the other, but from a third party. Plaintiff collects the commissions, and turns over to the salesmen their proportion thereof, but in so doing it acts merely as a collecting agency pursuant to its agreement with the salesman. If no commission is collected, the loss falls, not on plaintiff, but on both. Neither is performing the work of the other. Each is performing his allotted function in the joint enterprise."

The same result was reached by the Oklahoma court in *Sears-McCullough Mortgage Co. v. Oklahoma Employment Security Commission*, 172 P.(2d) 613 (1946), involving facts identical to those involved in the previous case.

As heretofore stated, the California court was not presented with facts exactly identical to the case at bar. However, some of the facts were quite similar, and therefore the decisions are worthy of note. Thus, in *California Employment Stabilization Commission v. Morris*, 28 Cal.(2d) 812, 172 P.(2d) 497 (1946), the Supreme Court of California, in an en banc decision, held that certain real estate salesmen selling *a realty company's own property* on commission, entirely unfettered by any directions as to method, time, territory or prospects, were independent contractors and therefore not in employment under the California unemployment act. Another distinction in the facts with the case at bar is that the salesmen there paid

for their own telephone, stenographers, stationery, postage and business cards.

The same result was reached as to similar real estate salesmen in *California Employment Stabilization Commission v. Norins Realty Co. Inc.*, 175 P.(2d) 217 (1946), which is likewise an en banc decision by the California Supreme Court.

CONCLUSION

These cases have determined what are "the normal business relationships," independent of the Acts involved herein, whereby business associations have been formed under similar or identical facts. They have held that the real estate broker has a "proprietary interest" in the commission and, according to some, that the broker is a joint venturer and according to others, an independent contractor. If either, the broker *cannot be an employee.* And the concept of "proprietary interest" is as remote as the poles from that of "wages" or "employee." There can therefore be no question but that the "*normal business relationship*" herein is not that of employer and employee.

Since the Supreme Court, in the cases of *United States v. Silk* and *Harrison v. Greyvan Lines, Inc.*, 91 Law Ed. Adv. op. 1335, has said:

> "The taxpayer must be an 'employer' and the man who receives wages an 'employee.' There is no indication that Congress intended to change normal business relationships,"

there is no employer-employee relation herein within the meaning of the Acts, and the judgment of the

District Court should be reversed with instructions to enter judgment in favor of appellant as prayed for.

Respectfully submitted,

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No. 11596

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

HENRY BRODERICK, INC.,
Appellant

vs.

CLARK SQUIRE, Collector of Internal Revenue,
Appellee

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES, FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

HONORABLE CHARLES H. LEAVY, *Judge*

BRIEF FOR THE APPELLEE

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sessed under the Federal Unemployment Tax Act for the period January 1, 1943 to December 31, 1943, and for the period January 1, 1944, to December 31, 1944, in the sums of $1,042 and $1,380.05, respectively. All of the taxes were paid on August 4, 1945. (R. 29-30.) Claims for refund were filed on August 11, 1945, and were rejected by notice dated January 2, 1946. (R. 30.) Within the time provided in Section 3772 of the Internal Revenue Code and on February 13, 1946, the taxpayer brought an action in the District Court for the recovery of the taxes paid. (R. 30.) Jurisdiction was conferred on the District Court by Section 24, Fifth, of the Judicial Code. The judgment was entered on January 27, 1947 (R. 32-33.) Within three months and on March 17, 1947, a notice of appeal was filed (R. 33-34), pursuant to the provisions of Section 128(a) of the Judicial Code, as amended.

QUESTION PRESENTED

Whether real estate brokers who sold real estate for and on behalf of taxpayer were performing services as its employees within the meaning of Section 1426(a) and (b) and Section 1607(b) and (c), Internal Revenue Code.

STATUTES AND OTHER AUTHORITIES INVOLVED

The statute and other authorities are set out in the Appendix, *infra.*

STATEMENT

The facts as found by the District Code in its findings of fact (R. 25-30) may be summarized as follows:

Taxpayer now is and at all times material herein was a corporation duly organized and existing under and by virtue of the laws of the State of Washington. (R. 25.) It was and is one of the leading and well known real estate brokerage firms in the City of Seattle, enjoying the good will of and a reputation for fair dealing with the public. (R. 27.)

During the periods involved each of the brokers whose remuneration became the subject of the tax herein entered into a written agreement with taxpayer. (R. 26, 43-47.)

The brokers agreed to sell real estate for clients of taxpayer on a commission basis. Such sales were made of properties listed with taxpayer and all contractual relationships between the owner of the property and the seller of the property were with the tax-

payer. The commission received from such activity became the property of taxpayer. When a transaction was finally consummated and commissions were paid, taxpayer divided the proceeds of such commission equally between itself and the individual broker who made the sale. (R 26-27.)

Taxpayer maintained an office properly equipped with furnishings and staff suitable to serving the public as a real estate broker. (R. 27.)

Each of the brokers involved was supplied with desk room in taxpayer's office, as well as a telephone, switchboard service and reasonable and necessary stenographic services, and taxpayer in its sole discretion might mention in its advertising the name of the broker engaged in selling. (R. 27.)

All current listings were available to the brokers. However, taxpayer reserved the right to place in the temporary possession of any one of them exclusive privileges of sale. (R. 27.)

Regular sales meetings were attended by both taxpayer's salaried real estate salesmen and the brokers herein involved, though there was no compulsory requirement that the brokers be in attendance. At these meetings discussions were had regarding matters of the business of selling, and assignments of

listed property were made by taxpayer. Any broker could make a choice of listings but this was subject to such limitations as taxpayer might impose. (R. 27-28.)

Either taxpayer or its brokers might terminate the relationship existing between them at will, and generally the brokers were given a free hand as to whether they would devote all or part of their time to the services of selling listed real estate for taxpayer, although, on the other hand, if they should undertake to sell real estate for other brokers or make sales in their own name and on their own behalf they would be considered as violating the obligations they had assumed, and be discharged. (R. 28.)

Each broker paid his own bond premium for broker's license, license fee, business and occupation taxes, car expenses, insurance, and other expenses incident to the conduct of his services as a real estate broker. (R. 28.)

The brokers did not have any regular time or hours, and worked on deals whenever it was convenient for them to do so. They were not required by taxpayer to make any specific calls during the day, and they were not compelled to give their entire time to the business of selling real estate. (R. 28.)

The trial court found as ultimate facts that wages for remuneration for employment were paid by taxpayer to the broker salesmen (R. 28); that these wages were paid by and from funds belonging to taxpayer (R. 29), and that the services were performed by the broker salesmen for taxpayer as its employees (R. 29).

Deficiency tax in the sum of $1,938.63 was assessed for the period April 1, 1943, to March 31, 1945, on the ground that the broker salesmen were taxable employees of taxpayer under the Federal Insurance Contributions Act. Taxpayer paid the deficiency on August 4, 1945. (R. 29.)

Deficiency taxes in the sum of $1,042.00 and $1,380.05 were assessed for the periods January 1, 1943, to December 31, 1943, and January 1, 1944, to December 31, 1944, respectively, on the ground that the broker salesmen were taxable employees of taxpayer under the Federal Unemployment Tax Act. The deficiencies were paid on August 4, 1945. (R. 29-30.)

Taxpayer filed claims for refund of the deficiency payments on August 11, 1945. (R. 30.)

The Commissioner of Internal Revenue, on January 2, 1946, notified taxpayer the claims for refund were disallowed. (R. 30.)

This action was timely brought on or about February 13, 1946 (R. 30.)

SUMMARY OF ARGUMENT

Construing coverage under the Social Security Act in the broad and liberal manner intended by Congress and testing the relationship of taxpayer and its brokers in the light of the various factors which the Supreme Court said should be considered, compels the conclusion that the brokers were employees and not independent contractors.

Decisions of state courts denying coverage to real estate salesmen or brokers under state unemployment statutes are not binding on this Court.

ARGUMENT

I

THE BROKERS WERE EMPLOYEES OF THE TAXPAYER FOR THE PURPOSES OF THE FEDERAL INSURANCE CONTRIBUTIONS ACT AND THE FEDERAL UNEMPLOYMENT TAX ACT

Cases involving the question of coverage under the social security laws have been before this Court on other occasions. *United States v. LaLone*, 152 F. (2d) 43; *United States v. Aberdeen Aerie No. 24*, 148 F. (2d) 655; *Matcovich v. Anglim*, 134 F. (2d) 834,

certiorari denied, 320 U. S. 744; *Anglim v. Empire Star Mines Co.*, 129 F. (2d) 914.

In the *Aberdeen Aerie* case this Court, on the basis of the pronouncement by the Supreme Court in *Labor Board v. Hearst Publications*, 322 U.S. 111, recognized that the old familiar common law principles no longer applied in determining coverage under the Social Security Act and that the applicability of the statute was to be judged instead on the basis of the purposes that Congress had in mind when the statute was enacted. In the case at bar the trial court, following the principle and reasoning of this Court in the *Aberdeen Aerie* case, held that the brokers were taxpayer's employees.

The principle announced in the *Aberdeen Aerie* case, that a liberal interpretation of the employment relationship must be applied in determining coverage under the Social Security Act, was recently fully approved by the Supreme Court in three cases. *United States v. Silk; Harrison v. Greyvan Lines, Inc.*, jointly decided on June 16, 1947 (1 C. C. H. Unemployment Insurance Service, par. 9304); *Bartels v. Birmingham*, and *Geer v. Birmingham*, decided in a single opinion on June 23, 1947 (1 C. C. H. Unemployment Insurance Service, par. 9306). Another case, *Rutherford Food Corp. v. McComb*, decided by the

Supreme Court on June 16, 1947 (15 L. W. 4652), involved the same question of the employment relationship in the application of the Fair Labor Standards Act.

We submit that the principles announced in those cases required an affirmance of the lower court's decision. A detailed statement of those cases in the order in which they were decided is warranted.

THE *SILK* AND *GREYVAN* CASES

In the *Silk* case, *supra*, the taxpayer was engaged in the retail sale of coal. The Commissioner of Internal Revenue determined that the taxpayer was the employer of the persons he engaged to unload coal from the railway cars and those engaged to deliver the coal to his customers. Accordingly, the Commissioner assessed and collected the social security taxes incurred. The coal unloaders were paid a specific price per ton for the coal they unloaded. The unloaders came to work for the taxpayer when and as they pleased and were assigned a car to unload and a place to put the coal. They furnished their own tools, worked when they wished and for others at will. With respect to the truckers, the taxpayer engaged persons who owned their own trucks to deliver coal at a specified price per ton to be paid out of the price

that the trucker received from the customer. The truckers were not instructed how to deliver the coal but merely as to where the coal was to be delivered and whether the charge was to be collected. Any damage caused by the truckers was paid for by the taxpayer. The truckers were free to come and go from the taxpayer's premises, and to refuse to make a delivery. They hauled for persons other than the taxpayer when they pleased, paid all the expense of operating their trucks, and furnished extra help and all equipment necessary. Both the District Court and the Circuit Court of Appeals held that the unloaders and the truckers were independent contractors.

In the *Greyvan* case, *supra*, the Commissioner determined that the truckers engaged by the taxpayer, a common carrier, to perform the actual service of carrying goods shipped by the public, were the taxpayer's employees. Accordingly, the Commissioner assessed and collected the social security taxes with respect to those truckers. The taxpayer there involved operated a trucking business under a permit issued by the Interstate Commerce Commission throughout a large part of the United States and parts of Canada carrying largely household furniture. The truckers undertook to haul exclusively for the

taxpayer, to furnish their own trucks and their own equipment and labor necessary to pick up, handle and deliver shipments, to pay all expenses of operation, to furnish fire, theft and collision insurance specified by the taxpayer, to pay for all loss or damage to shipments, to indemnify the taxpayer against all loss caused by the truckers or their helpers, to paint the designation "Greyvan Lines" on their trucks, to make collections for the taxpayer, to post a $1,000 bond and a $250 cash deposit pending final settlement of accounts, to personally drive or be present on the truck when the helper was driving and to follow all the rules and regulations prescribed by the taxpayer. All trucking contracts were between the taxpayer and the shipper. Under the contract, which was terminable at the will of either party, the trucker received a specified percentage of the price charged to the shipper. All permits and franchises necessary to the operation of the trucks were obtained at the company's expense. The District Court and Circuit Court of Appeals held the truckmen to be independent contractors.

In the single opinion written for both the *Silk* and *Greyvan* cases, the Supreme Court first reviewed the legislative history and the purposes underlying the enactment of the Social Security Act. It was

explicitly held, as the District Court in this case held, that the terms "employment" and "employee" as used in the Act were "to be construed to accomplish the purposes of the legislation"; to alleviate the hardships of unemployment and old age. It was stated that:

> As the federal social security legislation is an attack on recognized evils in our national economy, a constricted interpretation of the phrasing by the courts would not comport with its purpose. Such an interpretation would only make for a continuance, to a considerable degree, of the difficulties for which the remedy was devised and would invite adroit schemes by some employers and employees to avoid the immediate burdens at the expense of the benefits sought by the legislation.

Justice Rutledge in expressing his agreement with the Court's statement of the law paraphrased it in this manner:

> I agree with the Court's views in adopting this [the broader and more factual] approach and that the balance in close cases should be cast in favor of rather than against coverage, in order to fulfill the statute's broad and beneficent objects. A narrow, constricted construction in doubtful cases only goes, as indeed the opinion recognizes, to defeat the Act's policy and purposes *pro tanto*.

In determining the law to be applied and the interpretation to be given to the term "employee", the Court recognized that not all persons who rendered

services were "employees", that the "problem of differentiating between employee and an independent contractor" had been difficult even "before social legislation multiplied its importance", and that there was no " 'simple, uniform and easily applicable test'." The Court rejected the test of tort liability, the "power of control, whether exercised or not, over the manner of performing service" as it was rejected in *Board v. Hearst Publications, supra.* It was stated that there were a number of factors to be considered in determining whether a person was an employee or independent contractor, but that "no one is controlling", and that " 'the primary consideration in the determination of the applicability of the statutory definition is whether effectuation of the declared policy and purposes of the Act comprehend securing to the individual the rights guaranteed and protection afforded by the Act'."

While the members of the Court unanimously agreed upon the law to be applied, as summarized above, the application of the law to the particular facts involved in those cases proved difficult and brought forth disagreement. The Court unanimously agreed that applying the law to the question of the status of the unloaders involved in the *Silk* case, those unloaders were employees despite the conclusion of both the District Court and Circuit Court of Appeals

that they were independent contractors. However, in determining the status of the truckers involved in both *Silk* and *Greyvan*, the majority of the Court reached the conclusion that they were not employees, although Justices Murphy, Black and Douglas, dissenting, were "of the view that the applicable principles of law, stated by the Court and with which they agree" would require the conclusion that the truckers also were employees rather than independent contractors. Justice Rutledge, also dissenting, while in agreement as to the law to be applied, would have remanded the case to the District Court for its conclusions based upon correct principles of law stated by the Court, rather than the law erroneously applied by the District Court.

In stating the reasons for the result reached by the majority, it is apparent that there were factors present which indicated even some doubt on the part of the majority for the result reached with respect to the truckers, factors which impelled three dissenting Justices to reach just the opposite conclusion on the same principles of law. The majority of the Court concluded:

> These unloaders and truckers and their assistants are from one standpoint an integral part of the businesses of retailing coal or transporting freight. Their energy, care and judgment may

conserve their equipment or increase their earnings but Greyvan and Silk are the directors of their businesses. On the other hand, the truckmen hire their own assistants, own their trucks, pay their own expenses, with minor exceptions, and depend upon their own initiative, judgment and energy for a large part of their success.

Both lower courts in both cases have determined that these workers are independent contractors. These inferences were drawn by the courts from facts concerning which there is no real dispute. The excerpts from the opinions below show the reasons for their conclusions.

Giving full consideration to the concurrence of the two lower courts in a contrary result, we cannot agree that the unloaders in the *Silk* case were independent contractors. They provided only picks and shovels. They had no opportunity to gain or lose except from the work of their hands and these simple tools. That the unloaders did not work regularly is not significant. They did work in the course of the employer's trade or business. This brings them under the coverage of the Act. They are of the group that the Social Security Act was intended to aid. Silk was in a position to exercise all necessary supervision over their simple tasks. Unloaders have often been held to be employees in tort cases.

There are cases, too, where driver-owners of trucks or wagons have been held employees in accident suits at tort or under workmen's compensation laws. But we agree with the decisions below in *Silk* and *Greyvan* that where the arrangements leave the driver-owners so much responsibility for investment and management as here, they must be held to be independent contractors. These driver-owners are small busi-

> nessmen. They own their own trucks. They hire their own helpers. In one instance they haul for a single business, in the other for any customer. The distinction, though important, is not controlling. It is the total situation, including the risk undertaken, the control exercised, the opportunity for profit from sound management, that marks these driver-owners as independent contractors.

Considering the result reached by the Court with respect to the truckers involved in the *Silk* and *Greyvan* cases and comparing them with the brokers in the case at bar, it is obvious that there is an important factual dissimilarity. In nearly every vital fact the brokers operated in a manner which was not only fundamentally different from the function of the truckers but in most significant respects was diametrically opposed. The most critical of these factors, the one on which the Supreme Court apparently placed the most emphasis, was the capital invested and risked by the truckers in their own trucks and other equipment and the "energy, care and judgment" they used to conserve that equipment. *The brokers had no capital investment and furnished no equipment.*

Considering the general nature of the *Greyvan* drivers' functions, the Supreme Court stated that "their energy, care and judgment may conserve their equipment or increase their earnings" although Greyvan was the director of their business, that they de-

pended "upon their own initiative, judgment and energy for a large part of their success", and that where their arrangement left them "so much responsibility for investment and management, * * * [in] the total situation, including the risk undertaken, the control exercised, the opportunity for profit from sound management", they were small businessmen and must be held to be independent contractors.

It is difficult to find any of those attributes in the brokers. They had no equipment to conserve, no responsibility for investment or management, and no control to exercise. The fact that the brokers enjoyed considerable latitude in determining when they should work is not important. As the Supreme Court ruled with respect to the unloaders in the *Silk* case, the fact that they "did not work regularly is not significant."

Whatever ingenuity the brokers might use to sell real estate listed with taxpayer in order to increase their earnings did not convert them from employees to independent contractors. The same ingenuity and initiative is characteristic of anybody who works by piece work or on a commission basis. The ingenuity exercised by a waiter to increase his tips and earnings does not make him a businessman or any the less an employee of a restaurant. Taxpayer asserts that

opportunity for profit rested entirely on the brokers' initiative, judgment and energy. (Br. 25.) While we will agree that the amount of a broker's commission increased as his sales increased, we cannot agree that such an amount represented a "profit". To call the remuneration which the broker received a "profit" would be begging the very question here for decision. If the brokers were employees they could not realize "profits" from their sales. Only independent businessmen or corporations realize "profits". The remuneration the brokers received was in the form of commissions and their remuneration increased when they were successful in consummating a sale.

An individual who engages in an independent business ordinarily has a capital investment therein and the risk or opportunity for loss is as great or greater than the opportunity for profit. Here the brokers contributed no capital and took no risk. If they were unsuccessful or if their relationship with taxpayer was terminated, they lost nothing more than their jobs. Taxpayer furnished them a place to work, telephone facilities, stenographic help and all the forms necessary to transact its business. Taxpayer even furnished them with advice. (R. 44-45.) True the brokers furnished their own cars but there was no evidence of how many had cars or that they were

required to have cars. The evidence did not reveal the extent to which the car-owner brokers used their cars in taxpayer's business as contrasted with personal use. We believe this fact is significant, especially when considered in the light of the *Greyvan* and *Silk* cases, because there the truck owners were required to own and use their trucks in order to stay in business. Here there was no evidence to establish that a car was a necessary tool of the real estate business. On the other hand, the evidence showed that individual brokers were ordinarily assigned a special territory in which to work. (R. 105.) It is not unreasonable to assume that a broker who customarily specialized in downtown business property, for instance, had no need for a car. The fact that the brokers and the taxpayer paid for their gasoline and oil as well as their brokers' licenses and bond premium is unimportant. Taxi drivers who were required to do likewise have been held to be employees. *Jones v. Goodson*, 121 F. (2d) 176 (C.C.A. 10th).

While a certain amount of skill was required on the part of the brokers in order to sell real estate, we do not consider this fact persuasive or important. It is true the brokers were required by state statute to possess certain qualifications before they could obtain licenses but this is true of many individuals,

including doctors, lawyers, and scientists who enter the private employment of a firm or corporation. They must pass rigid state examinations or hold degrees from outstanding universities before they are eligible to be licensed.

It seems obvious that the brokers were not "small businessmen" as the truckers involved in the *Silk* and *Greyvan* cases here discussed. In the *Silk* case the truckers could and did hire out their services and their trucks to persons other than Silk. In the *Greyvan* case the truckers had their trucks and equipment to continue in the trucking business whenever they chose to sever their relations with Greyvan. Here, the brokers could not engage in the real estate business in competition with the taxpayer and, upon termination of their employment, they would have no capital investment or equipment, such as office facilities or stenographic help, with which to engage in business.

THE *BARTELS* AND *GEER* CASES

Factually these cases were identical. The taxpayer, a dancehall operator, contracted with the bandleaders to play at his establishment for a specific price, most of the engagements being for one night only. Under the contract involved the bandleader fixed the salaries of the musicians, paid them, told

them what and how to play, provided the sheet music and arrangements, the public address system, and the uniforms. The leader engaged and discharged the musicians, paid agent's commissions, transportation, and other expenses. The contract involved provided that the dance-hall operator was the employer of the musicians and should "have complete control of the services which the musicians would render under the contract". The Supreme Court, reversing the court below, held that the provisions of the written contract were not conclusive in determining who was the employer, and following the *Silk* case, concluded that the "elements of employment mark the bandleader as the employer". The Court pointed to the fact that the leader organized, trained and selected the band and that it was his skill and showmanship that determined the success or failure of the organization; that the relations between him and the other members of the band were permanent whereas the relationship between the operator and the band was transient; that the leader bore the loss and profit after the payment of the musicians' wages and expenses.

The decision in these cases is significant because of the reiteration that the liability for taxes under the Social Security Act is "not to be determined solely by the idea of control which an alleged em-

ployer may or could exercise over the details of the service rendered to his business." Moreover, it is significant that here the taxpayer selected and trained the brokers in much the same manner as the leader in the *Bartels* and *Geer* cases did with respect to his musicians. Taxpayer required that its brokers be men "of substance" who would not be a "detriment," to taxpayer's business. (R. 101.) Taxpayer retained experts in various fields pertaining to real estate and these experts were available to advise the brokers in connection with details being handled by them (R. 44-45.) The fact that taxpayer was interested in obtaining personnel of high quality was entirely understandable since the brokers represented taxpayer rather than themselves, and taxpayer had a good reputation to uphold in the community. But this is not persuasive of an independent contractor relationship. Any business which depends on the public's confidence and good will must seek outstanding men to represent it.

It is further significant that in the *Bartels* and *Geer* cases the relationship between the dance-hall operator and the band was transient whereas the relations between the leader and the other members of the band were permanent. Here the relationship between the brokers and taxpayer was a continuing one.

For instance, one witness, the only broker who testified, stated that he had been connected with taxpayer for eight years. (R. 132.) Ordinarily an independent contractor is engaged to perform a particular piece of work, such as in the case of a building contractor, for instance, to build a building, or in the case of a doctor, to perform a surgical operation. After the services are performed the relationship between the independent contractor and the one for whom he performed services is terminated.

Perhaps the following words taken from the *Bartels* and *Geer* opinion are the most easily applied to the question before this Court:

> * * * in the application of social legislation employees are those who as a matter of economic reality are dependent upon the business to which they render service. In *Silk*, we pointed out that permanency of the relation, the skill required, the investment in the facilities for work and opportunities for profit or loss from the activities were also factors that should enter into judicial determination as to the coverage of the Social Security Act. It is the total situation that controls.

Applying this language, the Government maintains that the brokers were in "economic reality" dependent upon the taxpayer's business and that they had no economic existence except that which was furnished by the name of taxpayer's business, the tax-

payer's investment, equipment and facilities. Further, it is evident that the permanency of the relationship was virtually the same as that of the musicians with their leader; that the brokers had no investment whatsoever, that little skill was required, that their opportunities for increasing their earnings were limited by the very nature of their occupation, and that risk of loss did not exist. If a broker's relationship with taxpayer was terminated he was, in "economic reality", a man out of a job.

THE *RUTHERFORD FOOD CORP.* CASE

The opinion of the Court in the *Rutherford Food Corp.* case throws a little more light on the result to be reached herein. The question involved was whether certain meat boners were employees of the petitioners within the Fair Labor Standards Act. In considering that question, the Court recognized that "decisions that define the coverage of the employer-employee relationship under the Labor and Social Security Acts are persuasive in the consideration of a similar coverage under the Fair Labor Standards Act."

The petitioners involved operated slaughterhouses and were engaged in the business of processing meat products and the production of boned beef.

During the period there involved one of the petitioners entered into a written contract with one Reed, an experienced boner, which provided that Reed should assemble a group of skilled boners to do the boning at the slaughterhouse; that Reed should be paid for the work of boning a specified amount per hundred weight of boned beef; that he would have complete control over the other boners, who would be his employees; and that petitioner would furnish a room in its plant for the work and barrels for the boned meat. This contract was subsequently modified in only one substantial respect by providing for the payment of a certain amount of rent for the use of the boning room, although no rent was ever paid. The money paid by the petitioner for the boning was shared equally among all the boners except for a brief time when some of the boners were paid by the person contracting with the petitioner. The boners furnished their own tools, consisting of a hook, a knife sharpener and a leather apron.

In considering the question of whether those boners were employees of the petitioner, the Court noted that boning was one of a series of steps in the petitioners' operations occurring between the time the slaughtered cattle were dressed and the time the boned meat was trimmed for waste by an employee of the

petitioners. The Court also noted that the petitioners never attempted to control the hours of the boners except that they were required to keep the work current and the hours they worked depended in large measure upon the number of cattle slaughtered. The Court further observed that an employee might be one who is compensated on a piece rate basis, citing *United States v. Rosenwasser*, 323 U.S. 360; that railroad station "red caps" were "employees" even though they received their compensation from persons other than employers in the form of tips, citing *Williams v. Jackson*, 315 U.S. 386, and concluded that the boners were employees and not independent contractors within the Fair Labor Standards Act. The Court pointed out that the boners were a part of the integrated unit producing boned beef. This observation is particularly significant inasmuch as the brokers, in the case at bar, formed an integral part of taxpayer's business. Taxpayer could not have stayed in business without their services. The sales made by the brokers constituted more than 84 per cent of taxpayer's total volume of real estate sales; the balance being made by a staff of salesmen who were admittedly taxpayer's employees. (R. 126-127.) The Court made this observation which could well be analogized to the situation here:

The premises and equipment of Kaiser were used

> for the work. The group had no business organization that could or did shift as a unit from one slaughterhouse to another. The managing official of the plant kept close touch on the operation. While profits to the boners depended upon the efficiency of their work, it was more like piece work than an enterprise that actually depended for success upon the initiative, judgment or foresight of the typical independent contractor. Upon the whole, we must conclude that these meat boners were employees of the slaughtering plant under the Fair Labor Standards Act.

Taxpayer seems to place reliance on the fact that the agreement entered into by it with each broker provided the broker would be "free from control" of taxpayer "as to the manner and method" of performing his services. (Br. 24.) It is well settled that regardless of the provisions of any contract the courts will look to the factual situation to determine the relationship between the parties. *Bartels v. Birmingham, supra; Griffiths v. Commissioner*, 308 U.S. 355; *Matcovich v. Anglim, supra.*

While the Supreme Court has decided that the factor of control is no more important than any other factor, we believe the evidence in this case would justify, even under the now out-moded "common-law control test", the conclusion that the brokers were employees. Significant in this regard are the following facts:

(1) *The relationship between taxpayer and the brokers was terminable at will.*

The agreement specifically provided that the relationship could be terminated at any time by either party. (R. 47.) The brokers were subject to discharge if they performed services other than to the best interests of taxpayer, such as selling real estate to a rival broker. (R. 102.) The existence of the power to discharge has been held to be one of the most decisive factors. *Williams v. United States*, 126 F. (2d) 129 (C.C.A. 7th), certiorari denied, 317 U.S. 655; *Gulf Refining Co. v. Brown*, 93 F. (2d) 870 (C.C.A. 4th); *General Wayne Inn v. Rothensies*, 47 F. Supp. 391 (E.D. Pa.); *Kentucky Cottage Industries v. Glenn*, 39 F. Supp. 642 (W.D. Ky.).

(2) *The brokers were restricted as to territory and customers.*

Listings were given to certain brokers in a given territory or to certain brokers who specialized in a particular class of property. (R. 99-100.) Whenever taxpayer found it "expedient", a listing could be placed exclusively in a particular broker's hands. (R. 44.) Prospective customers were assigned to designated brokers best qualified, in the opinion of taxpayer's sales manager, to handle the deal. (R. 108.) Thus, taxpayer controlled the amount of work a

broker was privileged to undertake and limited him in the number of customers he could contact.

(3) *The brokers had no identiy of their own.*

There was nothing a broker could do in the real estate business independently of taxpayer. All listings of property and customers were required to be in taxpayer's name. (R. 45.) All negotiations with clients were had in taxpayer's name and taxpayer furnished all the necessary forms. (R. 48-58, 99-100.) The brokers had no privity of contract with the clients. (R. 109.) Taxpayer furnished business calling cards to the brokers on which were printed taxpayer's name and address, as well as the broker's name. (R. 59, 96.) All advertising was done in taxpayer's name, except that taxpayer, in its sole discretion, could mention a broker in the advertisement. (R. 44, 91.)

(4) *Taxpayer regulated the quality and quantity of the brokers' work.*

The brokers were required to work diligently and to exert their best efforts in furtherance of taxpayer's business. (R. 45.) This requirement was wholly inconsistent with an entrepreneurial concept of the relationship. Generally, an independent contractor is free to work whenever and in whatever manner he pleases. Here the brokers, while not required to

punch the clock, had to spend a reasonable amount of time in furtherance of taxpayer's business and, if they did not do so, or if they engaged in business with a rival firm, they could be discharged. The fact that some of the brokers were engaged in outside business activities is not important. Many employees work for more than one employer. Nor is it unheard of for an individual to spend part of his time in employment and the balance of his time in pursuit of an independent business.

(5) *Much of the brokers' time was spent on taxpayer's premises.*

All telephone and stenographic service was rendered in taxpayer's office. Some of the deals were closed in taxpayer's office. (R. 135.) Daily sales meetings were held on taxpayer's premises and, while the brokers were not required to attend, they usually did. (R. 86.) The meetings were presided over by taxpayer's secretary who was also manager of the sales department. The brokers discussed taxpayer's listings and were "asked" to discuss their selling experiences among themselves. (R. 94-95.)

(6) *Taxpayer required the rendition of reports concerning any transactions.*

All property listed or sold or other transactions

by the brokers were reported to taxpayer. The brokers collected the earnest money, delivered it to taxpayer's office and taxpayer deposited it in its bank account. All listings were secured in taxpayer's name and turned over to taxpayer.

(7) *The brokers' services were controlled to the extent required in their line of work.*

While the brokers may have had considerable freedom in their work, it was only the freedom which their type of work required. One would not expect taxpayer to control the details of the brokers' work. Their services were engaged on the assumption that they understood the techniques of selling and, as long as they produced a satisfactory amount of business and did not sell in competition with taxpayer, there was no necessity for detailed supervision of their work.

Taxpayer contends the brokers had a proprietary interest in the commissions earned and that payment of the commissions emanated from the property owners, not from the taxpayer. (Br. 26-29.)

The brokers agreed to sell real estate for taxpayer's clients on a commission basis. Such sales were made of property listed with taxpayer and all contractual relationships between the owner of the property and the seller of the property were with

taxpayer. Whenever earnest money on a deal was given a broker he issued taxpayer's receipt and delivered the money to taxpayer. Taxpayer deposited the money in its own bank account and the full amount was set up on its books in a "Buyer and Seller" account. (R. 72-73, 78-79.) When the deal was finally closed, taxpayer issued its check to the broker in accordance with the terms of the agreement. (R. 45-46, 73, 79, 118-119.) This same procedure was followed in the case of deals handled by tax payer's salesmen, who were admittedly its employees, except the salesmen did not receive their commissions until their regular payday, whereas the brokers were paid as soon as a deal was closed. (R. 75, 81-82, 116-118.) On the basis of these facts the trial court found that taxpayer paid wages from its own funds to the brokers as remuneration for their services. Compensation for services performed in employment is often paid in the form of commissions. The measurement, method, or designation of compensation is immaterial if the relationship of employer and employee in fact exists. Treasury Regulations, 106, Section 402.204, Appendix, *infra.*

The principal case relied on by taxpayer in support of its contention that the brokers had a proprietary interest in the commissions earned is *Koehler v.*

Myers, 21 F. (2d) 596 (C.C.A. 3d). Myers, a real estate salesman, had an oral agreement with Tucker, a broker, to sell real estate listed with Tucker on a commission basis. It was stipulated that Myers had a right to appear at settlements and demand and receive at that time his share of the commission. Myers also had the right to draw in advance on Tucker to the extent of commissions due him on properties which he had sold where settlement had not been made or the commissions earned had not been paid in full. While this arrangement was in effect Myers sold a piece of property but before the commission was paid Tucker became insolvent and a receiver was appointed. Myers sued the receiver contending that the relationship between him and Tucker was that of joint enterprise and that he was therefore entitled to one-half of the commission as his own individual property. The receiver contended that the relationship between Tucker and Myers was that of employer and employee and that therefore Myers was merely a general creditor and must share pro rata with the other general creditors. The court held that no employment relationship existed but that instead Myers and Tucker were engaged in a joint enterprise. The court therefore concluded that when the property was sold, one-half the commission belonged to Myers as his individual

property and that his claim had priority over the general creditors.

At the outset it should be noted that the court in the *Koehler* case was not concerned with whether Myers and Tucker were in an employment relationship within the meaning of the Social Security Act. If it had been so concerned, perhaps it would have applied the liberal interpretation of the relationship intended by Congress and reached a different conclusion.

Moreover, it was stipulated in the *Koehler* case that Myers had a *right* to appear at settlements and to demand and receive his share of the commission. In the case at bar it was shown that the brokers customarily received their checks from taxpayer whenever a deal was closed but there was no evidence that this occurred simultaneously with the payment of the commission by the client or that the brokers either did appear, or had a right to appear, at settlements and to demand and receive their share of the commission at that time. In the *Koehler* case, the salesman had a right to draw in advance to the extent of commissions due him on properties which he had sold where the settlement had not been made or the commissions earned had not been paid in full. Here, a commission was not considered earned until the deal

was finally closed and all monies due or owing by the client had been paid. Taxpayer did not provide a drawing account for the brokers and never made advances to them. (R. 119.) When a deal was finally closed taxpayer issued its check to the broker credited with the sale. Up until that time taxpayer exercised administration and control over all monies received and there was no evidence that any of the brokers claimed any right of ownership or proprietary interest in the fund. No privity of contract existed between the brokers and taxpayer's clients. A breach of contract by a client gave rise to a cause of action in favor of the taxpayer, not the broker. All of these circumstances are wholly consistent with an employment relationship. An employee, particularly a salesman, is often not paid until the customer has settled his account with the employer.

In the *Koehler* case the court decided that the salesman and the broker were engaged in a joint enterprise and that therefore they each had a proprietary interest in one-half of the commission. Here the taxpayer and the brokers have agreed that they did not intend their relationship to be "joint adventurer or partner" (R. 47.), and we submit that the evidence clearly showed they in fact carried out their intention.

II

STATE COURT DECISIONS ON THIS QUESTION ARE NOT CONTROLLING

Taxpayer cites a number of state court decisions which it asserts have denied the application of state unemployment acts to real estate brokers and salesmen. (Br. 29-34.)

It is well settled that a taxing act, in the absence of language evidencing a different purpose, is to be interpreted so as to give a uniform application to a nation-wide scheme of taxation and state law may control only when the federal taxing act, by express language or necessary implication, makes its own operation dependent on state law. *Burnet v. Harmel*, 287 U.S. 103. This Court has held itself not bound by state law in its determination of whether "taxi dancers" were covered under the Social Security Act. *Matcovich v. Anglim, supra.*

Moreover, while some state courts have construed their unemployment statutes so as to exclude real estate salesmen and brokers from coverage, others have reached a contrary result. *Babb & Nolan v. Huiet*, 67 Ga. App. 861, 21 S.E. (2d) 663.

In the *Babb & Nolan case, supra*, on facts sub-

stantially identical to those involved here, the court said (p. 865-866):

> * * * It clearly appears from the allegations in the plea and answer that the salesmen in question were under contract to perform services for the defendants, and did in fact perform services, for which they were paid commissions. While it appears that these salesmen had great latitude in working independently of the defendants in selling property, it nevertheless appears from the allegations and from the contract attached that they sold to customers from listings held by the defendants, and that the salesmen received a portion of the commissions and the defendants received a portion. Manifestly, in selling to prospects from which sales the defendants would obtain a portion of the commissions, the salesmen were performing services for the defendants. Under the terms of the contract the legal right to collect commissions on sales made by the salesmen was in the defendants and not in the salesmen. The salesmen were bound to look to the defendants for the payment of their proportionate part of the commissions. The defendants were under obligation to pay the commissions to the salesmen. These commissions were necessarily paid for services rendered. The salesmen therefore were, as provided in the act, performing services for "wages," which term includes commissions, for the defendants.
>
> * * *
>
> It does not appear from the allegations of the plea as amended, or from the contract that the salesmen at any time are free from control or direction as to the performance of their services. They are under obligation to the defendants to regulate their habits so as to maintain the good will and reputation of the defendants, and to

> abide by the law, and to exert their best efforts to sell real estate listed with the defendants. As to these matters the salesmen are necessarily under some control and direction of the defendants. The salesmen have the right to sell only property listed with the defendants. Therefore, the defendants have a control and direction over the salesmen as respects what property the salesmen shall sell. The salesmen are under the control of the defendants in so far as commissions are paid to the salesmen. As has been pointed out, the salesmen have no right to collect commissions from the owners of property sold, but this right is reserved in the defendants.
>
> * * * All the services performed by the salesmen, although perhaps they are not performed in the central office of the defendants, are performed within the limits, territorially or otherwise, of the contract.

Attention is directed to the fact that the Commissioner of Internal Revenue has ruled that real estate brokers are employees within the meaning of the act. Mim. 5504, 1943 Cum. Bull. 1066, 1067-1068, Appendix, *infra*. Admittedly, this ruling is not binding on courts, but it is an administrative interpretation of the statute which is not to be disturbed except for substantial reasons. *Brewster v. Gage*, 280 U.S. 327.

CONCLUSION

The judgment of the court below should be affirmed.

Respectfully submitted,

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August, 1947.

APPENDIX

Internal Revenue Code:

SEC. 1426 [as amended by Section 606 of the Social Security Act Amendments of 1939, c. 666, 53 Stat. 1360]. DEFINITIONS.

When used in this subchapter—

(a) *Wages.*—The term "wages" means all remuneration for employment, * * *.

* * *

(b) *Employment.*—The term "employment" means * * * any service, of whatever nature, performed * * * by an employee for the person employing him, * * *.

* * *

(26 U.S.C. 1940 ed., Sec. 1426.)

Section 1607(b) and (c), Internal Revenue Code, as amended by Section 614 of the Social Security Act Amendments of 1939, c. 666, 53 Stat. 1316 (26 U.S.C. 1940 ed., Sec. 1607), is identical with the above section.

Treasury Regulations 106, promulgated under the Federal Insurance Contributions Act:

Sec. 402.204. *Who are employees?*—Every individual is an employee if the relationship between him and the person for whom he performs services is the legal relationship of employer and employee.

Generally such relationship exists when the

person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to *what* shall be done but *how* it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer, but not necessarily present in every case, are the furnishing of tools and the furnishing of a place to work, to the individual who performs the services. In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is an independent contractor. An individual performing services as an independent contractor is not as to such services an employee.

Generally, physicians, lawyers, dentists, veterinarians, contractors, subcontractors, public stenographers, auctioneers, and others who follow an independent trade, business, or profession, in which they offer their services to the public, are independent contractors and not employees.

Whether the relationship of employer and employee exists will in doubtful cases be determined upon an examination of the particular facts of each case.

If the relationship of employer and employee exists, the designation or description of the relationship by the parties as anything other than that of employer and employee is immaterial. Thus, if such relationship exists, it is of no consequence that the employee is designated as a partner, coadventurer, agent, or independent contractor.

The measurement, method, or designation of compensation is also immaterial, if the relationship of employer and employee in fact exists.

No distinction is made between classes or grades of employees. Thus, superintendents, managers, and other superior employees are employees. An officer of a corporation is an employee of the corporation but a director as such is not. A director may be an employee of the corporation, however, if he performs services for the corporation other than those required by attendance at and participation in meetings of the board of directors.

Although an individual may be an employee under this section, his services may be of such a nature, or performed under such circumstances, as not to constitute employment within the meaning of the Act (see section 402.203).

Section 403.204, Treasury Regulations 107, promulgated under the Federal Unemployment Tax Act, is identical with the above section, in all material respects.

Mim. 5504, 1943 Cum. Bull. 1066, 1067-1068:

* * *

2. The relationship between real estate brokers and salesmen is sufficiently uniform to enable the Bureau of Internal Revenu to take administrative notice of, and rely upon, the established customs and practices in the field, regulatory legislation, and other factors which materially affect the conditions under which real estate salesmen work. The broker operates an independent business, dealing directly with those who engage his services for the buying, selling, and leasing of real estate. The salesman's function is to represent the broker, and whatever business he transacts is the business of the broker. In general practice, a salesman serves only one broker in real estate transactions, and listings obtained by the salesman become the property of the broker. The broker is to a certain extent responsible for the acts of the salesman, and the salesman is under some compulsion to render services in a manner most advantageous to the broker. Regulatory laws in most of the States contemplate that a real estate salesman shall have the privilege of engaging in that occupation, not independently nor in the course of his own business, but only as his activities may be related to and under the supervision of a licensed broker.

3. In the written contract in the case of the O Investment Co., to which S.S.T. 346 related, the salesman agrees to work diligently and with his best efforts to sell, lease, or rent real estate listed with the broker, and to solicit additional listings and customers for the broker. He agrees to regulate his habits so as to maintain and increase the good will and reputation of the broker, and to abide by all of the rules and regulations and code of ethics that are binding upon or applicable to real estate brokers and salesmen. The broker agrees to allow the salesmen to work out

of his office; to make available to the salesmen current listings of the office, except such as he may find expedient to place in the exclusive possession of another salesman for a given period; and to assist the salesman with the work by advice, instruction, and full cooperation. This is typical of most written or oral contracts between real estate brokers and salesmen.

4. It will be noted that such a contract is one of personal service. The salesman has not become obligated to achieve a particular result, and he has no delegable duties. The contract provisions are sufficiently broad to permit the broker to dictate the manner and means for soliciting and transacting business; the broker may determine the listings upon which the salesman may work, and through assignment and reassignment of listings may regulate the activities of the salesman; there are no specific limitations in the agreement on the extent to which the broker may advise and instruct the salesman; and it is not unreasonable to assume that this provision affords the broker ample opportunity to direct a salesman to call on a particular prospect at a given time or to pursue a prescribed sales technique.

5. Brokers customarily provide desk space, telephone facilities, and clerical and stenographic service for their salesmen. The salesmen operate directly from the broker's office; it is the focal point of their activities. There are fixed office procedures. A particular salesmen may remain in the office on a given day each week and handle all, or as much as the broker permits, of the new business coming to the office by telephone and personal call. As a general rule there are sales meetings, and some brokers use the

meetings as a medium for releasing information regarding current listings and for advising and instructing the salesmen in regard to policies, techniques, and other matters pertaining to the business. Leads are furnished, and salesmen are expected to follow them up and report on the progress made. Frequently the broker or his sales manager participates directly in the negotions. The actual contract of sale or lease is executed by the broker or his sales manager.

6. It is not feasible for a broker to exercise complete control over all of the physical activities of his salesmen. A salesman must of necessity have some latitude in determining whom he will solicit and the time and place of solicitation. Interviews with prospects must be arranged at such times and places as the prospects may desire. Moreover, some salesmen do not devote their full time to the business of their brokers. Under the customs, practices, and usual agreements pertaining to salesmen's activities, however, a broker has the right to control the means and methods of such services as the salesmen undertake to perform on behalf of the broker.

7. It is held that real estate salesmen who perform services for brokers under the customs and practices described above are employees of the brokers for purposes of the taxes imposed by Titles VIII and IX of the Social Security Act, the Federal Insurance Contributions Act, and the Federal Unemployment Tax Act.

* * *

No. 11596

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

HENRY BRODERICK, INC., *Appellant*,

vs.

CLARK SQUIRE, individually and as Collector of Internal Revenue for the District of Washington, *Appellee*.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

REPLY BRIEF OF APPELLANT

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CASES CITED

STATUTES

IN THE

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REPLY BRIEF OF APPELLANT

As stated in our opening brief, the facts of this case are not in dispute. Therefore this court is free to review the facts and to substitute its own judgment untramelled by the findings and conclusions of the District Court.

Appellee does not take issue with this statement. However, in stating the facts, he refers almost exclusively to the findings of the District Court, in an obvious attempt to ignore the rule stated.

On the whole, appellee's brief repeatedly seeks to confuse the uncontroverted evidence, and continually indulges in inferences, assumptions, arguments and conclusions, not only unwarranted by the facts, but

actually in the very teeth of the terms of the contract and the uncontradicted testimony as to the practices followed thereunder.

For example, the statement that "The commission received from such activity became the property of tax payer" at page 4, is nothing but a conclusion of the trial court unsupported by the evidence, completely ignoring the uncontradicted testimony that until earned, the commission is the property of neither, and that only one-half thereof ever enters the profit and loss account of appellant.

The statement at page 4 that "Regular sales meetings were attended by both tax-payer's salaried real estate salesmen and the brokers herein involved" implies that the salesmen and brokers attended the same meetings, leaving inference that the instructions, dictation and control as to the salesmen, extended also to the brokers. But these are the admitted facts:

At the daily employee meeting, at which the *employees* are *required* to attend, work is assigned, reports are required, and instructions given. While at the *brokers* meeting, held at an *entirely different hour*, which the brokers need not and do not regularly attend, only general real estate news and matters of general real estate interest are discussed and made available.

The same confusion is attempted by reference to assignments of listed properties. The statement is true insofar as the employee-salesmen were concerned, but definitely untrue as to the brokers involved herein.

The use of the word "discharged" is likewise mis-

leading. It finds no basis whatsoever in the documentary or oral proof. It is found only in the court's findings as a conclusion wholly unsupported by the evidence. Its use therefore, begs the very question at issue—for obviously the word can only properly be used in connection with an employer—employe relationship.

Despite announcement of the rule that a liberal interpretation of the employment relationship must be applied in determining coverage under the Social Security Act, the fundamental governing principle as announced by the Supreme Court in *United States v. Silk* and *Harrison v. Greyvan Lines, Inc.*, 91 Law. Ed. Adv. Op. 1335, must not be lost sight of, viz: that it was not the purpose of Congress "to make the Act cover the whole field of service to every business enterprise," and that "there is no indication that Congress intended to change *normal business relationships* through which one business organization obtains the services of another to perform a portion of production or distribution."

Turning to the cases cited by appellee at pages 7 and 8 of his brief, involving decisions of this court on the question of coverage under the Social Security laws, it is significant that in three of those cases, this court found the existence of either a partnership, joint adventure, or independent contractor relationship, despite the same argument by government counsel made in this case, that the more liberal interpretation required the finding of an employee-employer relationship.

Thus in *United States v. LaLone*, 152 F.(2d) 43,

this court in reversing the District Court with instructions to enter a judgment affirming the decision of the Social Security Board which had previously ruled that the individual involved was not an employee, but a partner or joint venturer, said, speaking of the *Hearst* case:

> "We do not believe that *N.L.R.B. v. Hearst Publications* necessitates a ruling in this case that LaLone was an employee of Barrett & Co. In that case the Supreme Court refused to follow the rigid common law concepts of employee-employer in interpreting a statute similar to this one. But the court recognized that: 'Myriad forms of service relationship, with infinite and subtle variations in the terms of employment, blanket the nation's economy. Some are within this Act, others beyond its coverage. Large numbers will fall clearly on one side or on the other, by whatever test may be applied. But intermediate there will be many, the incidents of whose employment partake in part of the one group, in part of the other, in varying proportions of weight."

Likewise, in *United States v. Aberdeen Aerie*, 148 F.(2d) 655, this court affirmed the judgment of the District Court holding that physicians for a fraternal organizations were not "employees" within the meaning of the Act despite the government's insistence that the *Hearst* case required a contrary conclusion. It will be recalled there that the physicians were elected annually by the Aerie membership to render professional services to the members for which they were compensated by the Aerie at the rate of $.50 per quarter for each member in good standing during the

preceding quarter. The lodge furthermore exercised some supervision by requiring that the physicians submit reports periodically and maintain regular office hours, and by defining the types of diseases or injuries which the physicians may treat.

And in *Anglim v. Empire Star Mines Co.*, 129 F. (2d) 914, this court affirmed the holding of the District Court that various miners who had leased underground portions of a mine from the mine owner were independent contractors, despite the fact that the owner furnished tools, had the right of inspection, and the right to require the discharge of objectionable workmen, and the miners had the duty to perform in miner-like manner. The *Hearst* case had not yet been decided, but it was the position of the government that the regulations promulgated under the Act, which are almost identical with those quoted in the appendix to his brief herein, required a contrary holding.

It is worthy of notice that this court in the *Empire Star Mines* case discussed in detail the contrast between the procedure followed by the mine owner with respect to its admitted employees and the miners in question. We have attempted to point out similar contrasting differences in our opening brief between appellant's admitted salesmen employees and the brokers in question herein.

The fourth case decided by this court cited by appellee—that of *Matcovich v. Anglim*, 134 F.(2d) 834, is the only one of the four in which the employment relationship was found to exist. That case involved

the status of a "taxi dancer" and the court there found that under "ordinary standards" an employer-employee relationship was indicated from the large degree of control that was exercised by the dance hall operator as to hours of work, dress, deportment and behavior.

In discussing the *Silk* and *Greyvan* cases, appellee states that the factor upon which the Supreme Court "apparently placed the most emphasis" (Br. 16) was the capital investment risked by the truckers. This, in the face of the court's own pronouncement that no one factor is "controlling" and that the "total situation" must be considered in determining coverage under the Act.

In any event, contrary to appellee's attempt to minimize the broker's investment in the enterprise, the record is clear that each broker owned his own car, paid his own bond premium and fee for broker's license, business and occupation taxes, car expenses, insurance, and other expenses incident to the conduct of his services as a real estate broker. The nature of their occupation called for no greater investment. The contention that the evidence failed to establish that a car was a "necessary tool" in the real estate business, and that "it is not unreasonable to assume that a broker who customarily specialized in down town business property, for instance had no need for a car" (Br. 19), demonstrates such extreme naivete of either the nature of the real estate business or of the size of the city of Seattle, as to hardly warrant comment. Undoubtedly, government counsel, writing appellee's brief from Washington, D. C., also labor under the

assumption that cowboys, Indians, and prospectors on their way to the gold fields of Alaska, constitute the bulk of the city's inhabitants, and that Seattle's business and commercial district is just a matter of a few blocks walking distance.

At page 17, appellee compares the ingenuity that may be exercised by the broker in selling real estate, with that exercised by a waiter to increase his tips, or by any other piece worker on a commission basis. The comparison is not even close as it overlooks completely the many other controls exercised over such manual workers.

The statement is made at page 19 that "the evidence showed that individual brokers were ordinarily assigned a special territory in which to work." This statement is absolutely contradictory of the evidence which established beyond peradventure that there was no limitation as to territory, and that any restriction was of the broker's own choosing.

Appellee cites *Jones v. Goodson*, 121 F.(2d) 176 (C. C.A. 10) which held that tax drivers working for a cab company were employees. The purchase of gasoline and oil by the drivers was a very insignificant element in the case compared to the many controls otherwise exercised by the company, such as the right to determine the shift to be worked, the selection of the car to be driven if a company owned car, the territory to be covered, and the right to discharge for infraction of rules. The drivers furthemore, were required to paint the company's insignia on their cars and to telephone their whereabouts hourly.

At page 19, appellee admits that a certain amount

of skill is required on the part of
argues that this is unimportant bec
true of doctors, lawyers and scientist
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of the *Greyvan* case where the truckers there
exclusively for Greyvan under a *continuing r*
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To say that the brokers were in "economic

required to paint the designation of the company on their vehicles. Their identity was therefore completely submerged, but that fact had no bearing on the issue.

Appellee further contends that the permanency of the relationship was virtually the same as that of the musicians with their leader—overlooking the permanency of the relationship of the truckers in the *Greyvan* case.

To say therefore, that if the broker's relationship with taxpayer was terminated, he was in "economic reality" a man without a job, totally ignores the ability of the broker to continue selling real estate by virtue of his individual broker's license. So long as he chooses to continue selling real estate and is seeking either listings or prospects, he cannot be said to be a man without a job any more than it can be said that a lawyer or physician is a man without a job merely because he has no clients or patients to represent or administer to at a given moment.

The *Rutherford Food* case cited at page 24 is clearly inapposite since the work of boners for the slaughter house was of a routine nature, performed entirely on the employer's premises during more or less fixed hours of employment, dependent upon the number of cattle slaughtered, and the workers provided their own simple tools, with no opportunity to gain or lose except from the work of their hands and the tools. Their status was therefore very similar to that of the unloaders in the *Silk* case.

Appellee states that the observation of the court in the *Rutherford* case, that the boners were an integ-

ral part of the business, is "particularly significant" inasmuch as the brokers here likewise constituted an integral part of appellant's business, and that "taxpayer could not have stayed in business without their services." The argument is fallacious in fact as well as in law. Were not the truckers in the *Silk* and *Greyvan* cases an "integral part" of the business of retailing coal or transporting freight? Appellant therefore was no more dependent upon its brokers for its existence in business than Silk or Greyvan upon its truckers. Furthermore, appellee overlooks the fact that appellant had its own salesmen-employees who could and did also sell real estate. Its other departments—Property Management and Insurance—certainly were not dependent upon its brokers. Hence, how can it logically be argued that appellant could not have stayed in business without their services?

Appellant agrees that the factual situation controls over provisions of a contract in determining coverage. But how is such rule applicable in the instant case, since appellee has failed to point out a single instance where the factual situation differs in any respect from the contract.

When we reach that portion of appellee's brief devoted to discussion of the case from the "common law control test" (Br. 27-32), we find nothing but a studied effort to distort the facts to fit the law. This portion of appellee's brief abounds in false premises, assumptions and conclusions not supported by the record.

Thus, at page 28 appellee argues that since the relationship was terminable at will, therefore ap-

pellee had the power to discharge, citing page 102 of the record as authority. We invite the court to read that page of the record to see if the word "discharge" is ever mentioned therein. The most that we can find there is that one of appellant's officers testified that if a broker attempted to transact business on his own in connection with the sale of real estate, appellant would consider that "a breach of our agreement." How does this support appellee's contention that appellant had the right to discharge?

The same element however, was present in the *Silk* and *Greyvan* cases. In fact, in all human relationships, outside of slavery, involuntary servitude, and in war, man makes his associations voluntarily, with the expectation that they will prove to his advantage, and if he is disappointed in those expectations, that he can terminate them. Partnerships are simple examples. They are usually terminable at will, but one would scarcely urge that that fact established control. Otherwise, the employee's right to terminate if dissatisfied would likewise establish control in the employee over his employer.

Appellee next argues that the brokers were restricted as to territory and customers. Yet there is not one scintilla of evidence in the record that bears out such a statement. As pointed out at page 12 of our opening brief, the utmost freedom of action was exercised by the broker. Any preference as to territory was of the brokers' own choosing. At no time was a *listing* placed exclusively in a particular broker's hand (Tr. 103, 104, 107, 108). It is true that *prospects* could be referred to some particular broker who was special-

izing in that type of property, but that fact would not prevent another broker in the meantime from attempting to sell the same property, since the original listing would likewise be in his hands (Tr. 104, 105).

Appellee's third point is that the brokers had no identity of their own. Everything that is said concerning this point was also true in the *Silk* and *Greyvan* cases, without any effect whatever upon the court's holding that the truckers were independent contractors. Thus, the truckers working for Greyvan were required to paint the designation "Greyvan Lines" on their trucks, and all bills of lading were between the company and the shipper. The truckers' names at no time appeared in the transaction so far as the customer was concerned. Their identity was completely merged in that of the company for whom they were hauling. How does such an argument, therefore, establish an employer-employee relationship?

Appellee's fourth point is that appellant regulated the quality and quantity of the brokers' work. This statement is factually false under the record. The fact that the brokers agreed to work diligently and to exert their best efforts to rent or sell listed property certainly does not militate against either a joint venture or independent contractor relationship. These elements are present in every such relationship, for it is nothing more than agreement on the part of the joint adventurer or independent contractor to fulfill his part of the bargain. Does not a building contractor, physician or lawyer always agree either expressly or impliedly, that he will perform the particular task in a diligent manner? Here again appellee confuses

the right to terminate such a relationship with the power to discharge an employee. The record proves conclusively that the brokers had the utmost freedom of action as to determining the time, place and manner of fulfilling their part of the bargain (Tr. 72, 89, 91, 133). Appellee's statement, therefore, that the brokers were regulated by the taxpayer as to quality and quantity of their work is nothing more than wishful thinking.

Appellee's next point is that much of the brokers' time was spent on the taxpayer's premises. This statement is as inaccurate as the preceding four contentions. On the contrary, the record shows that most of the work of the brokers is performed outside the office of appellant, and either in the field, purchaser's home or in the office of an attorney or escrow company. The broker likewise received calls at his own home, for his residential telephone number appears in the ads carrying his name. It is true the office of appellant is their headquarters—but so was the building on the premises of Silk used as the focal point for the truckers awaiting their turn to deliver coal.

Point 6, that "taxpayer required the rendition of reports," is another bald statement unsupported by the evidence. At no time were progress reports required from the brokers. The fact that the brokers turned in a signed earnest money receipt and deposit or turned in listings to appellant's office was nothing more than performance of their agreement. How else could the the business be handled in orderly fashion? With the number of men involved, *regardless of the relationship*, it is most natural, in fact obvious, that a single

and common office be selected for bookkeeping, care of funds, listings, telephone and the like. Did not the truckers for Silk and Grayvan collect money and deliver it to the companies? How does this fact alter or affect an independent contractor relationship?

Appellee's final contention on this phase, that "the broker's services were controlled to the extent required in their line of work," is not only meaningless, but immediately contradicted in appellee's own argument immediately following. Thus, appellee concedes that the brokers had considerable freedom in their work, and were not supervised in detail, but says that it was "only the freedom which their type of work required." Contrast their freedom however, with the control exercised over the salesmen in appellant's employ. They too sold and rented real estate—yet they did not enjoy the freedom of the brokers. How then can it be said that the brokers enjoyed only the freedom which their type of work required?

In attempting to answer appellant's contention that the brokers had a proprietary interest in the commission earned, appellee fails to recognize any distinction between the procedure followed in the case of the salesmen-employees and that followed with the brokers, over-looking the fact that in the former case, the *entire commission*, when earned, has gone into appellant's profit and loss account—whereas in the case of brokers—only *one-half thereof* is ever credited to that account.

Appellee's attempts to distinguish the *Koehler* case are weak. The mere fact that the court there was not concerned with the Social Security Act is not a valid

point of distinction, for fundamentally, the issue was identical, viz., a determination of the true business relationship between Meyers and Tucker. No liberal interpretation of the Social Security Act can change a relationship of joint venturer or independent contractor into an employer-employee relationship.

Appellee's attempted distinction over the broker's right to appear at settlements in the *Koehler* case is mere quibble for the contract in the instant case gives each broker the right to his division of the commission *as soon as it has been earned.* We submit that that is the same as having the right to appear at settlements to demand and receive their share.

The right to draw in advance in the *Koehler* case, strengthens rather than weakens appellant's position, for, if anything, it would tend to support the existence of an employer-employee relationship. It is true that up to the moment that a deal is closed and the commission earned, a broker cannot claim any proprietary interest in the fund—but neither can appellant. Up to that point, appellant is the bare custodian of the fund. Not even the property owner can claim his part until all terms of the earnest money receipt are met.

The fact that no privity existed between the broker and the property owner has already been discussed. This element was not only present in the *Koehler* case, but also in the *Silk and Greyvan* cases. So also, the fact that enforcement of the contract between appellant and the property owner would be brought in appellant's name is immaterial. This was precisely the manner in which the commission was collected in the *Koehler* case.

Appellant concedes that it is immaterial what the parties may have called their relationship, since it is the factual practice which controls. Thus, the fact that they agreed that they do not intend the relationship to be that of "joint adventurer or partner" did not prevent the Washington Supreme Court from holding that a joint venture was the relationship created. At any rate they did express an intent to create an independent contractor relationship, and it is immaterial whether this court adjudges the relationship to be either joint venturer or independent contractor, since in either event, there would be no coverage under the Social Security Act.

Appellee makes no attempt to distinguish or even discuss the many state decisions passing on the precise point at issue, cited at pages 30 to 34 of appellant's opening brief. Instead, appellee is content to mention and copiously quote from *one* decision from the State of Georgia, and print in full an untried administrative ruling by the Commissioner of Internal Revenue. These are presented by appellee as being more persuasive than decisions from the highest courts of Missouri, New York, Oklahoma, Tennessee, Washington, and California.

It is significant that even the solitary case cited by appellee did not involve licensed real estate *brokers*. Georgia, like Washington, issues licenses to real estate *brokers* as well as real estate *salesmen*. Those involved in the *Babb* case were *salesmen* and not *brokers*, and were expressly made "sub-agents" of the broker with respect to clients and customers. The Georgia law defining real estate salesmen, provides:

> "Real estate salesman means a person *employed* by a licensed real estate broker to sell or offer for sale * * * real estate * * * *for or on behalf of such real estate broker;* also any person, other than bookkeepers and stenographers, *employed* by any real estate broker." Georgia code, Sec. 84-1402

In other words, the salesmen involved in the *Babb* case, corresponded to plaintiff's salesmen—employees, upon whom Social Security taxes have always been paid.

Furthermore, it nowhere appeared in the *Babb* case that the commissions were held in trust and received by neither until earned. The commission therefore in the *Babb* case when earned, became the property of the employing broker, who owed the salesmen a commission just as any employer owes his salesman employee his salary. The broker there had chosen to establish relations not with licensed independent real estate *brokers*, but with real estate men licensed to act only as the broker's salesmen-employees. To have upheld the broker's contentions there would have meant giving approval to acts made illicit by express statute.

A further point of distinction lies in that the salesmen in the *Babb* case could sell only property listed with the employing broker, while here the brokers associated with appellant could and often did make sales of property in advance of any listing with appellant. Furthermore, the salesmen there would clearly be "without a job" if their services were terminated, since their license permitted them to work only for

another broker, and not to engage in business on their own.

The ruling of the Acting Commissioner of Internal Revenue of April 15, 1945, *reversing his previous ruling*, may be dismissed for the reason first, that we are here concerned, not with real estate *salesmen* paid by the firm in the same manner as other employees working on commission, but with *brokers* having a *proprietary* interest, and secondly, no ruling of the Commissioner can enlarge or amend the controlling statute or overrule judicial interpretations.

This ruling furthermore does not cover the same facts as are involved herein, since it is predicated upon the provisions in state *salesmen* license laws and upon requirements that salesmen call upon designated prospective buyers, pursue certain sales techniques, make required reports, the employing broker controlling the *means* and *methods* to be used; and salesmen spending alternate days in the office handling such new business as the broker dictates. In other words, the ruling is based upon the identical practice followed as to plaintiff's salesmen employees as distinguished from the brokers involved herein. It is significant that the zeal and diligence of appellee's counsel has failed to produce any citation upholding the Acting Commissioner except the *Babb* case. Not one decision involving licensed real estate *brokers* has been produced by appellee, supporting his contention that the normal business relationship existing between a real estate office and brokers associated with it under circumstances identical to those at bar, was that of employer and employee.

CONCLUSION

We respectfully reiterate therefore, that under the admitted facts and the overwhelming decisions of state courts which have passed on identical facts, these brokers should be held to fall outside the coverage of the Social Security Act, since they are not employees under the normal business meaning of the word.

Respectfully submitted,

EGGERMAN, ROSLING & WILLIAMS,
D. G. EGGERMAN,
JOSEPH J. LANZA,
Attorneys for Appellant.

No. 11599

United States
Circuit Court of Appeals
For the Ninth Circuit

SAMUEL MORRIS WIXMAN, also known as SHULIM WIXMAN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division

Rotary Colorprint, 870 Brannan Street, San Francisco 7-10-47—60

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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* Page numbering appearing at foot of page of original certified Transcript of Record.

ORIGINAL
(To be retained by Clerk of Court)

UNITED STATES OF AMERICA

No. 186 125536

PETITION FOR NATURALIZATION

[Of a Married Person, under Sec. 310(a) or [illegible] of the Nationality Act of 1940 (54 Stat. 1144-1145)]

To the Honorable the DISTRICT Court of THE UNITED STATES at LOS ANGELES, CALIF.

This petition for naturalization, hereby made and filed pursuant to Section 310(a) of [illegible] of the Nationality Act of 1940, respectfully shows:

(1) My full, true, and correct name is SHULIM WIXMAN
(Full name in naturalization, and any other name which has been used, must appear here)

(2) My present place of residence is 870 N. Kenmore, Los Angeles, 27, Cal. (3) My occupation is Research worker Social Service &
(Number and street) (City or town) (County) (State)

(4) I am 45 years old. (5) I was born on March 25, 1900 to Kiev, Russia
(Month) (Day) (Year) (City or town) (County, district, province, or state) (Country)

(6) My personal description is as follows: Sex male; color white, complexion fair color of eyes hazel color of hair brn, height 5 ft. 3 inches, weight 130 pounds; visible distinctive marks none; race white; present nationality none-last Russi

(7) I am ..... married; the name of my wife or husband is Myrtle; we were married on June 25, 1927
(Month) (Day) (Year)

at Cupertino, Calif.; he or she was born at Minneapolis, Minn. on June 3, 1905
(City or town) (State or country) (City or town) (County, district, province, or state) (Country) (Month) (Day) (Year)

entered the United States at ..... on ..... for permanent residence in the United States, and now resides at
(City or town) (State) (Month) (Day) (Year)

with me and was naturalized on ..... at .....
(Number and street) (City or town) (State or country) (Month) (Day) (Year) (City or town) (State)

certificate No. ....., or became a citizen by .....

(7a) (If petition is filed under Section 311, Nationality Act of 1940) I have resided in the United States in marital union with my United States citizen spouse for at least 1 year immediately preceding the date of filing this petition for naturalization.

(7b) (If petition is filed under Section 312, Nationality Act of 1940) My husband or wife is a citizen of the United States, is in the employment of the Government of the United States, or of an American institution of research recognized as such by the Attorney General of the United States, or an American firm or corporation engaged in whole or in part in the development of foreign trade and commerce of the United States, or a subsidiary thereof; and such husband or wife is regularly stationed abroad in such employment. I intend in good faith to take up residence within the United States immediately upon the termination of such employment abroad.

(8) I have 1 children; and the name, sex, date and place of birth, and present place of residence of each of said children who is living, are as follows:

Lyrsam(m) 2-22-28-Calif; res. with me

(9) My last place of foreign residence was Kiev, Russia (10) I emigrated to the United States from Kiev
(City or town) (Country, district, province, or state) (Country) (City or town)

Ruasia (11) My lawful entry for permanent residence in the United States was at New York, N.Y. under the name
(Country) (City or town) (State)

of Scholem Lieserman on July 16, 1911 on the SS Pres dent Cra t as shown by the certificate of my
(Month) (Day) (Year) (Name of vessel or other means of conveyance)

arrival attached to this petition.

(12) Since my lawful entry for permanent residence I have not been absent from the United States, for a period or periods of 6 months or longer, as follows:

DEPARTED FROM THE UNITED STATES			RETURNED TO THE UNITED STATES		
PORT	DATE (Month, day, year)	VESSEL OR OTHER MEANS OF CONVEYANCE	PORT	DATE (Month, day, year)	VESSEL OR OTHER MEANS OF CONVEYANCE

(13) (Declaration of intention not required) (14) It is my intention in good faith to become a citizen of the United States and to renounce absolutely and forever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty of whom or which at this time I am a subject or citizen, and it is my intention to reside permanently in the United States. (15) I am not, and have not been for the period of at least 10 years immediately preceding the date of this petition, an anarchist; nor a believer in the unlawful damage, injury, or destruction of property, or sabotage; nor a disbeliever in or opposed to organized government; nor a member of or affiliated with any organization or body of persons teaching disbelief in or opposition to organized government. (16) I am able to speak the English language (unless physically unable to do so). (17) I am, and have been during all of the periods required by law, attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the United States. (18) I have resided continuously in the United States of America for the term of 1 year at least immediately preceding the date of this petition, to wit, since July 16, 1911 (19) I have not heretofore made petition for naturalization
(Month) (Day) (Year)

number 94,859 on Dec. 18, 1941 at Los Angeles, Calif. in the U.S. District
(Month) (Day) (Year) (City or town) (County) (State) (Name of court)

Court, and such petition was dismissed or denied by that Court for the following reasons and causes, to wit: dismissed at petitioner's request and the cause of such dismissal or denial has since been cured or removed

(20) Attached hereto and made a part of this, my petition for naturalization, are a certificate of arrival from the Immigration and Naturalization Service of my said lawful entry into the United States for permanent residence (if such certificate of arrival be required by the naturalization law), and the affidavits of at least two verifying witnesses required by law.

(21) Wherefore, I, your petitioner for naturalization, pray that I may be admitted a citizen of the United States of America, and that my name be changed to .....
SAMUEL LORUS WIXMAN

(22) I, aforesaid petitioner, do swear (affirm) that I know the contents of this petition for naturalization subscribed by me, that the same are true to the best of my own knowledge, except as to matters therein stated to be alleged upon information and belief, and that as to those matters I believe them to be true, and that this petition is signed by me with my full, true name. SO HELP ME GOD.

bmc

× Shulim Wixman
(Full, true, and correct signature of petitioner, without abbreviation)

Form N-400
U. S. DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE
(Edition of 1-13-41)

816—19600

AFFIDAVIT OF WITNESSES

The following witnesses, each being severally, duly, and respectively sworn, depose and say:

My name is Herbert Canaan my occupation is Attorney

I reside at 2142 W. 7th St. Los Angeles, Calif.
(Number and street) (City or town) (State)

My name is Lester Roth my occupation is Attorney

I reside at 621 S. Spring St. Los Angeles, Calif.
(Number and street) (City or town) (State)

I am a citizen of the United States of America. I have personally known and have been acquainted in the United States with Shulim Wyman, the petitioner named in the petition for naturalization of which this affidavit is a part, since 9-1-44 (Month) (Day) (Year) to my personal knowledge the petitioner has resided, immediately preceding the date of filing this petition, in the United States continuously since the date last mentioned, and I have personal knowledge that the petitioner is now and during all such period has been a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States, and in my opinion the petitioner is in every way qualified to be admitted a citizen of the United States.

I do swear (affirm) that the statements of fact I have made in this affidavit of this petition for naturalization subscribed by me are true to the best of my knowledge and belief SO HELP ME GOD.

Herbert Canaan (Signature of witness) Lester Roth (Signature of witness)

Subscribed and sworn to before me by the above-named petitioner and witnesses, in the respective forms of oath shown in said petition and affidavit, in the office of the Clerk of said Court at Los Angeles, Cal. this 25th day of Sept., Anno Domini 19 48 I hereby certify that Certificate of Arrival No. 23 108035 from the Immigration and Naturalization Service, showing the lawful entry for permanent residence of the petitioner above named, has been by me filed with, attached to, and made a part of this petition and affidavit.

By [illegible] Deputy Clerk.

SEAL OF THE U.S. DISTRICT COURT SOUTHERN DISTRICT OF CALIFORNIA [SEAL]

OATH OF ALLEGIANCE

I hereby declare, on oath, that I absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty of whom or which I have heretofore been a subject or citizen; that I will support and defend the Constitution and laws of the United States of America against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; and that I take this obligation freely without any mental reservation or purpose of evasion: SO HELP ME GOD. In acknowledgment whereof I have hereunto affixed my signature.

+ Shulim Wyman
(Signature of petitioner)

Sworn to in open court, this ..... day of ....., A. D. 19.....

Clerk.

By .....
Deputy Clerk.

NOTE.—In renunciation of title or order of nobility, add the following to the oath of allegiance before it is signed: "I further renounce the title of (give title or titles) which I have heretofore held," or "I further renounce the order of nobility (give the order of nobility) in which I have heretofore belonged."

Petition granted: Line No. ..... of List No. ..... and Certificate No. ..... issued.

Petition denied: List No. 1 - 2-5-47

..... Reason .....

U. S. GOVERNMENT PRINTING OFFICE 916—10460

Failure to establish attachment to the principles of the Constitution and favorable disposition to the good order and happiness of the United States.

Denied 2-7-47 See Order in file.

Failure to establish his burden of proof of attachment to the principles of the Constitution of the United States and a favorable disposition to the good order and happiness of the United States.

GOVERNMENT'S EXHIBIT No. 1

Economic Trends

Mr. Chairman and Friends:

Abraham Lincoln, when taunted on his homeliness by a political opponent during a debate, thought for a moment and then remarked,

> "I know I am no beauty, by gar;
> There are many more handsome, by far.
> But my face—I don't mind it,
> For I am behind it.
> It's those in front that I jar."

If I am permitted to paraphrase Lincoln's answer, I would say that, if some ideas I shall bring out are somewhat unconventional, unorthodox by far, I, too, do not mind them, for I am squarely behind them. I do hope you out there in front they will not jar.

There seems to prevail a mistaken notion that anyone who entertains and expresses—no matter how softly—any thoughts and principles other than those in support of the existing order, is ipso facto unpatriotic. From the outset may I say that the speaker yields to no one in the matter of loyalty to and love for this country, these United States of America. However, the country have in mind, may perhaps be to a degree different from that which some have been accustomed. The land I have in mind is one which beckoned to me some years ago as the land of opportunity for all, a land of plenty, one, the resources of which were sufficient to wipe

Government's Exhibit No. 1—(Continued)

out needs, hardships, and poverty for all honestly willing to work; a land in which cooperation and social-mindedness could create all necessities and comforts for all. On the other hand, if disloyal I am so only to a land in which want stalks in the homes and streets of cities and towns, in villages, on farms, on the highways and byways. I suffer but little love for a land that sets up upon and pedestal and accords a place of honor to those who are ever ready to brand everyone else an enemy of the country, while themselves fail to show much faith in the Bill of Rights, in the Constitution, or even in some of the more fundamental laws of humanity, decency and fairness.

I am about to offer to you a straight-forward examination of trends of thought that seem to warrant special attention because of their significance in present day economic life. The ideas to be presented are not elaborately detailed. They are not very statistical. What is intended is simply to analyze and evaluate these ideas.

My introductory words assumed the likelihood of differences of opinion in our midst. Any discussion of economic problems leads inevitably into the troubled waters of controversy. The question whether a lecturer, a teacher, or a writer should or should not "take sides" in a controversial issue is a very mooted one. Personally I believe that one should "take sides". Why? Because I am of the opinion that an honest and careful investigation of economic trends is bound to give the investigator

Government's Exhibit No. 1—(Continued)

a fairly definite conclusion. The students, the audience, the readers, then, are entitled to know what the conclusion is and the logic on which it is based. Experience in lecturing and writing has proven that this practice of arriving at and stating conclusions is sound. A conclusion definitely formulated challenges the listener or the reader. It forces him into agreement or disagreement with the author, which in itself helps to develop logical argument in support of whatever stand he takes. This, again, results in defense or attack on the part of those who take an opposing stand. And it is out of such clashes of conflicting ideas that there comes that development, that growth which is the very core of knowledge, the very life-blood of education.

In these days of necessary and inevitable social change it is importnat that we all remain calm and approach everything with scientific detachment.

The rapid development of our life in its numerous phases compels a constant restatement of the philosophies and theories underlying this development. This restatement, even in its latest revision, is bound to lag [6] more or less behind the reality of the moment which the restatement attempts to explain, because, by the time those who seek to explain and clarify the discovered new reality, the latter has partly ceased to be. Moreover, a still newer reality has taken its place. This mobility, this flux of the affairs of mankind, to me at least, is as natural as the ever-changing trend of things

Government's Exhibit No. 1—(Continued)

in Nature in general. Are we fearsome of describing and accounting for changes that take place in the inanimate, plant or animal world? No. Are we intolerant of new theories, facts, concepts in those fields of life? No. Is the world that concerns humans a part of Nature as a whole? Yes. Obviously, then, we humans must tolerate, no less, new philosophies that purport to describe changes in the realm of activities of humans. In particular, must we give a free hand to those whose object it is to interpret the cause and effect of those changes.

Now, if you will bear with me, suppose, for a few moments, we arrive at a perspective of this world of humans we call society. Suppose, again, we examine, even hurriedly this particular society we know so well—our United States. Examining it we will be examining the world at large. For does it not typify to a great degree the world?

Our country is probably the richest country in the world. In fact, we need not even qualify our statement with "probably." It is the wealthiest region right now—not potentially. It is the richest because it had in abundance at least three fundamental factors so essential for the creation of things —tangible and intangible—that would make for general progress and universal well-being. Those three necessary factors are:

1. Natural resources
2. The human agency
3. Tools or machine equipment

Government's Exhibit No. 1—(Continued)

Let us examine very briefly each of those in turn:

The first, Natural Resources, consists of land, soil, of which there abounds in the United States to the extent of roughly about 2 billion acres, only 1/3 of which is used presently for varied crops or for pasture; ¼ is still covered with forests; and less than 1/5 being still characterized by desert vegetation, which type of land, however, is gradually reclaimed by irrigation. These same 2 billion acres contain, in varying amounts and proportions, no less than 1,500 mineral substances, oil, gas, power of one sort or another, food, actual and potential.

The Human Factor, totaling roughly about 125,000,000, we are told, could be used in productive capacity to the extent of about 1/3 of its numbers.

Now, as to the third fundamental agency of a changing, productive society; the tools, the machine or mechanical outlay. Scientists, engineers, technologists tell us that right at this moment we have enough of modern machinery to permit every farmer—were he to utilize the tools at his disposal, or which he could have, if he were able to afford them—to produce enough to feed twenty people. We are told by the same scientists and engineers that our industries, such as the shoe industry, are now making use of their machine equipment to only between 25-50% of their maximum efficiency. That is, that industries today, with no additional or new machines, could still produce, in some cases, 50% more commodities than they are producing. We are assured that with only a few hours of work

Government's Exhibit No. 1—(Continued)

daily, a few, not 8, nor 10, nor 12, each person can earn an annual income of between $6,000-$20,000. If brief, that given the factors needed for the creation of goods for the use of man, there should be production and earnings in sufficiency for all.

What, however, is the actual state of affairs? Let us turn to no other source for our information that the periodic reports and bulletins issued by the different departments of the United States Government. Surely these should be regarded as authentic.

On the basis of such government estimates there are today, conservatively speaking, still some 12,000,000 able-bodied men and women begging for work at [7] almost any price. And they are still denied that opportunity. They asked to be permitted to make clothing for those whose clothes are threadbare, or for those who have none. (The growth of the Nudist fad of late years seems to me as no mere accident.) They begged to be allowed to create shoes for those the soles of whose shoes are worn-out and full of holes; for those who are down-in-their-heels. They ask for permission to tear down the smelly, slimy, grimy tenement houses of our slums, dwellings which have become little else than disease-infested, vermin-beleagered fire-traps. They ask to errect in their stead dwellings fit for man of the 20th century to live in. These willing-and-able-to-work unemployed literally beg to be allowed to raise enough food for the hungry and famished. But all of this they are denied. And as a result millions still go about in worn-out, ragged clothing; millions

Government's Exhibit No. 1—(Continued)

still are immured in dilapidated, unwholesome homes; millions still walk about underfed, nearly starved. And all this continues while the goods so sorely needed by these millions, and which goods were created by these self-same millions in times when it was still profitable to create goods, these goods lie in wharehouses, in bins, on the shelves. And these goods in their silence cry out eloquently for a consumer, but in vain.

Let us turn over the pages of this record of misery and stop for a moment at another picture—one that strikes much closer to home. Again the government bulletins divulge an unforgettable scene. Leaflet number 44 of the Department of Interior gives us an insight into what is going on in the field of education—a field to which this democracy of ours has ever been ready to point with pride, to hold up as a model. This leaflet, entitled "The Deepening Crisis in Education", states that during one year, despite laws providing for universal compulsory education, close to 3,000,000 children between the ages of 6 to 15 were not in school. Why? Not enough schoolrooms? No. Many a little red schoolhouse, with its window shutters and doors closed, looked longingly down on the youngsters running wildly about. Well, perhaps, not enough teachers to care for these 3,000,000 schoolless children. On the basis of 1930 normal classroom population it would take some 100,000 teachers to care for and instruct these youngsters. Where shall we get this many teachers in this crisis, you may ask? Where? But wait. The

Government's Exhibit No. 1—(Continued)

same leaflet, eminating from Harold L. Ickes, secretary of the Department of Interior, continues to tell us that there were during that year in the neighborhood of 250,000 unemployed teachers, (over 80,000 in California alone) all certificated, all trained and tried, many of them with many years of experience behind them—all ready to teach at that very moment. And what is even more remarkable, let us have a glimpse at the salaries of those who were still employed. 1 out of 4 teachers on a job received a salary of less than $750 a year. 84,000 teachers in rural districts, earned incomes of less than 450 dollars a year. Think of it, less than 38 dollars a month. 1 out of every 13 negro teachers earned a monthly salary of $25 or less. 1 out of every 4 teachers in rural Missouri taught school during that year from 1 to 4 months without pay. Do we have to repeat the stories of teachers' plight in Chicago, in Detroit? In the face of these facts, we have the United States Chamber of Commerce striking at every public school with a 20-point program, every point of which spelled curtailment of educational opportunities. And a ranking officer of the Dep't of Education, after travelling leisurely about in fascist countries like Germany and Italy, suggested, on his return, the following educational proposals:

1. Close one out of every five high schools.
2. Send four out of every five children out on the streets or into jobs now held by grown men and women.

Government's Exhibit No. 1—(Continued)

3. Make the tuition rates so high that only children of the rich would be admitted.
4. Stop the mass movement into colleges.

Does this bespeak of universal compulsory education? Is this offering equal educational opportunities for all?

Of course, there are many who say that these are not normal times, that we are in a depression now. That Capitalism is all right, that we better give it a chance to get on its feet again, that even now it is already on the way to recovery; in fact, that prosperity is just around the corner. Let us not be fooled again. Personally, I am somewhat impatient with such contentions. [8] In fact, I agree heartily with President Roosevelt who remarked, "The overwhelming majority of our population has little patience with that small minority which vociferates today that prosperity has returned, that wages are good, that crop prices are high and that government should take a holiday."

Even if we assume that a capitalist revival could be stimulated and affected by inflation and deflation schemes, by public construction schemes, or by what-have-you schemes, it would still have in it the inescapable capitalist tendency to generate a renewed depression. For the root fault of capitalism is "it leads, as soon as it becomes prosperous, to a self-destructive mal-distribution of income. The difficulty is not that there is not enough purchasing power to buy the available supply of goods, but that

Government's Exhibit No. 1—(Continued)

this purchasing power is wrongly distributed—too much to the rich and too little to the general body of wage workers." In the course of economic growth we have had many periods of so-called prosperity. However, the trouble was that the wealth of this mis-named prosperity was not equitably distributed among the millions of our country. Much too much profit went back to build new factories and too little found its way back to the people to buy the products from the factories we already had. This situation was bad both ways. Too much was produced and too little was consumed, in proportion as the margin between the value of goods produced and the value of goods consumed widened. As a result too great a share of prosperity went to too few people. These few amassed more and more because a person with a million dollars does not actually consume very much more than a person with a thousand dollars. After all, even the very very rich do not buy, let us say, $50.00 worth of ham and eggs for breakfast, which means that a partial solution to the ills besetting us is, to quote even General Hugh Johnson, "to find a way to let everybody have half a dollar's worth of ham and eggs." A boom under capitalism, which does not generate a new depression is impossible, since it is the inherent capitalist tendencies and contradictions that lead unavoidably to the logical slumps. The economic history and record of the economic growth of any and of all the industrially developed states proved this beyond a shadow of a doubt. Capitalism, then,

Government's Exhibit No. 1—(Continued)

under those circumstances, fails to provide the essentials for the system which is hopes will keep it alive.

In consequence, if the strongest card of the defenders of capitalism has always been that, despite all of its undenied inperfections and injustices, it does somehow on the whole contrive to "deliver the goods", so to speak, then surely it stands condemned and convicted by the arguments of its own apologists. For that is just what today capitalism is most obviously failing to do. In the face of an unprecedently rapid advance in productive power in both industry and agriculture—which ought to by all rules and regulations of the plainest common sense, yield to every person of every community a rapidly rising standard of life—one finds the wheels of production slowed down to a dangerous degree, and unemployment and distress existing on a scale unknown to living memory. Must it take, then, [9] much intelligence, to see that there must be something radically wrong with a system which holds that it is more beneficial to maintain millions upon millions of people in idleness than to set them to useful work? With the spectacle of economic and political futility, who can respect a system which, having the means to produce abundance, can find no way of distributing the wealth tha ts iits for the taking? What serious, sober, thinking or sane human being can rest satisfied with capitalism as it is right now? In its attempt to hold on for dear life, with its periodic booms and depressions, de-

Government's Exhibit No. 1—(Continued)

pressions and booms, for the sake of the fiction of prosperity, the system reminds me of the inmate in the insane asylum who, when asked by the examining psychiatrist as to why he continuously beat his head on the cell wall, replied, "I beat my head periodically on the wall because I enjoy the sensation when I stop."

This picture as painted, is the direct and inescapable result of the logic of events of capitalism of the 19th century and before. That capitalism was by its very nature, one without a plan. At least not a conscious plan, for whatever planning there may have been in it, was done by a mysterious power—an "invisible hand", as Adam Smith called it. Now, it became nothing short of blasphemy to attempt to interfere with the operation of that "invisible hand", and as long as it functioned somewhat satisfactorily for some, its workings were not questioned. But today a growing skepticism has put economic faith in Providence at a discount. As a result, for some years past one has been hearing of a strange new economic doctrine—a capitalist planned economic system. The advocates of this idea are "those from the capitalist ranks who have become influenced in part by the great growth of trusts and combines and partly by the example of the Five Year Plans elsewhere. Both, they say, have established an ordered system of production."

But capitalist planning is highly paradoxical, because planning involves the elimination of private enterprise and competition in the matter of kinds

Government's Exhibit No. 1—(Continued)

of goods produced, price to be charged, the share that is to go to the producer, the amount to be set aside for capital accumulation, and so forth. Now, are not the eliminated elements of private enterprise and competition the very props of capitalism, which if knocked from under would carry with them the system itself? And as long as industries are to be carried on with private profit as the incentive for production, the state will be compelled to guarantee the capitalist's profits, if it undertakes to direct its business for him. This in itself will destroy the incentive for efficient production, will tend to disrupt the capitalist system. In the end it will be exposed to the same dangers which face it today —unless it can "reconcile itself to altering the distribution of income drastically in favor of the wage-earning class. If it fails to do so, it will go down before the sheer weight of the poverty-stricken. If it does distribute incomes more equitably, the wage-earning class, given added power through augmented income, will insist on taking over the control of the economic system for itself." State capitalism under those conditions will find itself between the proverbial Scylla and Charybidis, between wrack and ruin. We cannot consequently, build up much of a case for state capitalism. [10]

With state capitalism out of the picture, what then is to take its place? Many suggest that the answer lies in one of two contending, underlying philosophies, which, thrown into the arena of today, are fighting for acceptance. These two under-lying

Government's Exhibit No. 1—(Continued)

philosophies are, individualism and collectivism, which in their latest form we may designate as fascism and socialism respectively. Interested as we are in today primarily let us take the newest arrivals into the laboratory and investigate the makeup and potentialities and promises of each.

What is the fascism? Well, fascism, whether in brown, black, silver, khaki or gold shirts, is the agent of big business in its struggle to retain economic and political power in diseased and dying capitalist states. It is the unconcealed rule of monopoly capitalism.

Wherever it puts in an appearance it arises at first as a lower middle class phenomena superimposing itself upon the capitalist class. The reason why the lower middle class is of such vital concern wherever fascism is mentioned, is because at the present time this same lower middle class—along with the working masses, has been driven relentlessly to the wall by the accumulated power of big business. The latter is the ruling class in modern society.

But today, fascism, no matter how willing it might be, can no longer serve the economic interest of the larger section of the lower middle class because the existing industrial structure will not permit it. The technological set-up of modern society is such that it is well nigh impossible to translate lower middle class economic interests into action. Therein is the rub as well as the basic con-

Government's Exhibit No. 1—(Continued)

tradiction of fascism. For, were it to attempt to reform or to rejuvenate the economic power of the lower middle class, implant some monkey glands, so to speak, it will find itself at variance and out of harmony with the interests of big business. Why? Because the economic structure of contemporary society is definitely built about an axis of mass production. To rebuild that structure about an orbit of small production would mean of necessity the tearing down of the whole technological structure, of this our society. Such a step in its turn would result in its complete economic paralysis. The fact that modern industry has introduced mass production in almost everything—from the manufacturing of toothbrushes to that of the automobile—spells the conclusion that in the struggle between two mutually antagonistic industrial processes, the small shop-keeper has no more chance of ultimate survival than the small individual store-keeper. Thus the very economic order of present day society will prevent fascism from injecting political restoratives into the lower middle class in order to revive its fast dwindling powers.

Failing thus in its primary function, does it mean that fascism will confess its impotence and capitulate—give up its ghost so to speak? Not at all.

The experience and history of the past few years has proved to us that wherever a clash of interests such as outlined above occurs, fascism in the main considers itself the dutiful servant of big business, and it is the latter which provides the financial sup-

Government's Exhibit No. 1—(Continued)

port to necessary [11] for the establishment and entrenchement of fascism. It is true fascism makes gestures to discipline the operations of big business in the interests of the corporate state—which means the creation of a national capitalist state to take the place of the hither-to pseudo-democratic-individualistic, capitalist state. This in itself is a confession that something is "rotten in Denmark". But the national capitalist state contains to no less a degree the inner contradictions of the more traditional capitalist society. And these inner contradictions, when carried to their logical conclusions, lead inevitably to privation and misery on the one hand, or to imperialism, aggression and war on the other hand. That war is inevitable, we may gather from the very apostle of fascism, Benito Mussolini, who feels that "fascism . . . . . believes neither in the possibility nor the utility of perpetual peace. It thus repudiates the doctrine of pacifism born of renunciation of the struggle and an act of cowardice in the face of sacrifice. War alone brings up to its highest tension all human energy and puts the stamp of nobility upon the peoples who have the courage to meet it."

What on the other hand is the antagonist of fascism? The collectivist state, according to its proponents, in brief, proposes that, "all resources, all lands and buildings, all manufacturing establishments, mines, railroads and other means of transportation and communication, should be, not private property but the common property of all

Government's Exhibit No. 1—(Continued)

those who work." It further proposes that society should consist only of those who work, which means that all members of society should be socially useful human beings . . . . . that production be made to serve the needs of those who work, rather than to serve the needs of a few parasites . . . . . that production and distribution of goods be planned scientifically to avoid anything resembling the crises of capitalist society, that the society established be intent on developing the machine technique, mass production, and a minute division of labor to the fullest possible extent . . . . . ."

But how is mankind to reach this state of practical idealism? The collectivist believes that it is necessary for society to go through four stages of development in the path from capitalism to socialism.

First of all, there must be the stage of the bourgois capitalism, which is characterized by private property, free enterprise and competition. This state of being, because of its inner defects and contradictions, must give way to another, "the change to be expediated and effected by the strong, determined, class-conscious part of the working class—" all workers or producers, or those laboring by brain or brawn—when a favorable opportunity presents itself.

This achieved, there is to follow the second stage—"the dictatorship of the masses." Realizing that since not all the workers are capable in managing government and industry, there must be an intelli-

Government's Exhibit No. 1—(Continued)

gent minority to pave the way by holding power and ruling with an iron hand till socialism is brought into being and all people are educated to its ideals.

The second stage is to give way to the socialist society—the third phase of collectivism. During this, "all means of production [12] will be in the hands of the democratically governed state. The masses of workers will now be in control. Wages will still be paid on the basis of efficiency or productivity, with some prevailing differences in wages as a result." Since there will still be considerable centralization of economic and political control, unless all vestiges of class opposition have been eliminated, this third stage is very much akin to state socialism.

The last and final phase of this societal change will be the collectivist society—the ultimate goal. This time, coersive authority will have disappeared, every one voluntarily participating in the cooperative commonwealth. This will be the real "classless" society, with no wage system, no price, no money—a system based upon the principle of "from each according to his ability, to each according to his need." Thus, cryptly put, will evolve the state known as Collectivism, a state which according to the prophetic, far-seeing vision of Karl Marx, is historically the logical outcome of a system of society that has outlived its usefullness, its mission, its place in history of economic growth of mankind.

Government's Exhibit No. 1—(Continued)

It is man's ultimate goal. It is the panacea for which he has been striving for untold ages. It is his El Dorado, his Promised Land—his ideal which he is to reach here on this earth now, and not "by and by when you die."

These doctrines have come to the forefront of late more than before because of the conditions we have been facing in the last half dozen years in particular. And no audience needs to be told of the terrible thing these six or seven years of depression have been. It is bad enough in physical suffering but it is worse in mental and spiritual effect. It dims man's hope, it starves man's faith in human institutions it puts fear and dread in hearts. It questions the advisibility of living all-together. The pathetic thing about these years of misery is its mockery of our common sense. In the words of President Roosevelt, "millions are homeless in cities of vacant homes, ill fed before full granaries, ill clothed in the presence of abundance and cut off from the chance to work for the other millions who are suffering for the want of their services." It does not make sense. It is more like the spell of black magic from a fairy book story.

But in this hard-boiled age we can't permit ourselves to be taken up with fairy book stories. We must approach the problems as they face us. We must hack our way out of trouble by our own efforts. No good fairy is fluttering around on the horizon to get us out of the difficulties.

In conclusion, may I say that the choice we are

Government's Exhibit No. 1—(Continued)

asked to make lies before us. If an economic system is to be judged on the basis of a worth-while standard of living for every man, woman and child under it, then we must choose accordingly. On that basis I cannot see any hope for economic planning in Italy, Germany, Japan and other such fascist countries. Nor do I see too much hope for this same economic planning in England, the United States, France and other democratic and pseudo-democratic states. Why? In all these instances unrestrained capitalism is in the saddle, and economic planning for all is wholly inconsistent with, and impossible under, unchecked capitalism. On the other hand, this study and reflection could lead one to conclude that progress, human well being—civilization in brief, definitely and decidedly has little to fear, nay, it has much to expect, from a system of genuine socialization.

The sentiment expressed in the following lines of verse seems very apropos: [14]

"Sedition"

By

Edmund Vance Cooke

You cannot salt the eagle's tail,
  Nor limit thought's dominion.
You cannot put ideas in jail;
  You can't deport opinion.

Government's Exhibit No. 1—(Continued)
If any cause be dross and lies,
Then drag it to the light;
Out in the sunshine Evil dies,
But fattens on the Night.

You cannot make a Truth untrue
By dint of legal fiction.
You cannot prison human view,
You can't convict conviction.

For tho by thumbscrew and by rack,
By exile and by prison,
Truth has been crushed and palled in black,
Yet Truth has always risen.

You cannot quell a vicious thought,
Except that thought be free;
Gag it, and you will find it taught
On every land and sea.

Truth asks no favor for her blade
Upon the field with Error,
Nor are her converts ever made
By threat of force and terror.

You cannot salt the eagle's tail,
Nor limit thought's dominion.
You cannot put ideas in jail;
You can't deport opinion. [15]

United States District Court, Southern District of California, Central Division

No. 126,536

In the Matter of the Petition of SHULIM WIXMAN for Naturalization.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT DENYING PETITION FOR NATURALIZATION.

Upon consideration of the petition for naturalization of Shulim Wixman and of the objections by the Government to the admission of said Shulim Wixman as a citizen of the United States, and after hearing thereon in open court, petitioner being represented by Lee Gallagher, Esq. and Herbert Ganahl, Esq., and the Government being represented by Frank J. Burns, Esq., and upon submission of said petition and cause, the court delivered an oral opinion from the bench, which opinion it was stipulated by petitioner's counsel and by the Government would suffice as the Findings of Fact and Conclusions of Law in such contested naturalization proceeding; and the court having found the facts in such proceedings as stated in said oral opinion from the bench, and having concluded that the petitioner Shulim Wixman had failed to establish his burden of proof of attachment to the principles of the Constitution of the United States and a favorable disposition to the good order and happiness of the United States, and the court having sustained the objections of the Government to the

admission of said Shulim Wixman to citizenship of the United States, now, therefore, in accordance with the evidence and in accordance with the Findings of Fact and Conclusions of Law heretofore made and entered herein as aforesaid.

It is accordingly ordered that the petition of Shulim Wixman for naturalization be and hereby is denied. Exceptions noted and allowed to said petitioner.

Dated this 7th day of February, 1947.

/s/ PAUL J. McCORMICK,
United States District Judge.

Judgment entered Feb. 7, 1947.
Docketed Feb. 7, 1947.
C. O. Book 41, Page 577.

EDWARD L. SMITH,
Clerk,

By /s/ E. N. FRANKENBERGER,
Deputy.

[Endorsed]: Filed Feb. 7, 1947.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Samuel Morris Wixman, also known as Shulim Wixman, petitioner above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the judg-

ment denying the petition for naturalization entered in this action on February 7, 1947.

WIRIN, KIDO & OKRAND,

By /s/ FRED OKRAND,
Attorneys for Appellant.

[Affidavit of service by mail attached.]

[Endorsed]: Filed March 19, 1947.

[Title of District Court and Cause.]

DESIGNATION OF RECORD

To the Clerk of the District Court of the United States in and for the Southern District of California:

Appellant hereby designates for the record on appeal in the above matter the entire record which you are requested to prepare.

Said record consists of the following:

1. Petition for Naturalization;
2. Reporter's Transcript of proceedings (orginal and one copy of which is filed herewith);
3. Exhibit 1;
4. Judgment entered February 7, 1947;
5. Notice of appeal;

6. This Designation.

Dated: April 17, 1947.

WIRIN, KIDO & OKRAND,
By /s/ FRED OKRAND,
Attorneys for Appellant.

Received copy this 17th day of April, 1947.
/s/ RONALD WALKER,
Asst. U. S. Atty.

[Endorsed]: Filed April 18, 1947.

[Title of District Court and Cause.]

ORDER DIRECTING CLERK TO MAKE CERTIFICATION OF NATURALIZATION RECORDS.

It appearing to the Court that the above named petitioner has filed notice of appeal from the order entered February 7, 1947, denying his application for naturalization and that the Clerk is now in the process of making up the record on appeal for certification;

And it appearing further that under section 341(e) of the Nationality Act of 1940 (Title 8, U. S. C. A. 741(e) the Clerk is prohibited from certifying certain naturalization records without an order of Court;

It is ordered that the Clerk of this court issue his certification of the petition for naturalization filed in the above entitled matter for the purpose of perfecting the record on appeal to the United

States Circuit Court of Appeals for the Ninth Circuit.

Dated at Los Angeles, California, this 21st day of April, 1947.

PAUL J. McCORMICK,
United States District Judge.

[Endorsed]: Filed Apr. 21. 1947.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 21 inclusive contain full, true and correct copies of Petition for Naturalization; Government's Exhibit 1; Findings of Fact, Conclusions of Law and Judgment Denying Petition for Naturalization; Notice of Appeal; Designation of Record and Order Directing Clerk to Make Certification of Naturalization Record which, together with copy of reporter's transcript, transmitted herewith, constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to $6.60 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 24 day of April, A. D. 1947.

[Seal] EDMUND L. SMITH,
Clerk,

By /s/ THEODORE HOCKE,
Chief Deputy Clerk.

[Endorsed]: No. 11599. United States Circuit Court of Appeals for the Ninth Circuit. Samuel Morris Wixman, also known as Shulim Wixman, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed April 28, 1947.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals for the Ninth Circuit

No. 11599.

SAMUEL MORRIS WIXMAN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

STATEMENT OF POINTS ON APPEAL

Appellant herewith designates as his points on appeal, the following:

1. The denial of the petition and the judgment thereon, denies to the appellant his right to freedom of speech within the meaning of the First Amendment to the United States Constitution.

2. The denial of the petition and the judgment thereon by the District Court abridges appellant's right to freedom of thought and freedom of opinion within the meaning of the "clear and present danger" rule.

3. The denial of the petition and the judgment thereon by the District Court is not supported by the evidence.

Dated: April 30, 1947.

WIRIN, KIDO & OKRAND,
By /s/ FRED OKRAND,
Attorneys for Appellant.

[Affidavit of service by mail attached.]

[Endorsed]: Filed May 2, 1947.

United States Circuit Court of Appeals for the Ninth Circuit

No. 11599.

SAMUEL MORRIS WIXMAN, also known as SHULIM WIXMAN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

ORDER GRANTING PETITION THAT REPORTER'S TRANSCRIPT OF TESTIMONY BE NOT PRINTED

Upon consideration of the petition of appellant that he be permitted to proceed on this appeal by printing the clerk's transcript, and that the reporter's transcript of testimony be considered in its original form, and of the opposition of counsel for appellee thereto, and good cause therefor appearing, It Is Ordered that said application be, and hereby is granted, and that appellant is permitted to proceed on the appeal herein upon a typewritten reporter's transcript of record, and printed clerk's transcript.

Dated: San Francisco, Calif., June 13, 1947.

/s/ FRANCIS A. GARRECHT,
Senior United States Circuit Judge.

[Endorsed]: Filed June 17, 1947.

No. 11599

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

SAMUEL MORRIS WIXMAN, also known as SHULIM WIXMAN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT.

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No. 11599

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

SAMUEL MORRIS WIXMAN, also known as SHULIM WIXMAN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT.

Jurisdiction.

This is an appeal from a judgment of the District Court of the United States for the Southern District of California, Central Division, entered on February 5, 1947 [R. 26-27][1], denying the petition for naturalization filed by appellant pursuant to section 310(a) of the Nationality Act of 1940 (54 Stat. 1144-1145, 8 U. S. C. 710(a)) [R. 2-4]. The District Court's oral opinion [Tr. 385-403], which is not reported, constitutes, pursuant to stipulation and court order [R. 26] the District Court's find-

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[1]This Court granted appellant's application to have printed only the clerk's transcript of the District Court record, and to have the reporter's transcript of testimony considered in its original form [R. 33]. The latter will be referred to as "Tr." and the former as "R".

ings of fact and conclusions of law. The appellant objected to the District Court's findings, conclusions, and judgment [Tr. 403, R. 27].

Appellant resided at the time of the filing of the petition, and has continuously resided since that time, within the jurisdiction of the District Court. The District Court's jurisdiction rested upon Section 301(a) of the Nationality Act of 1940 (54 Stat. 1140, 8 U. S. C. 701(a)); and this Court has jurisdiction of this appeal, under Section 128 of the Judicial Code (43 Stat. 936, 28 U. S. C. 225(a)).

Statute Involved.

Section 310(a) of the Nationality Code (54 Stat. 1144-1145, 8 U. S. C. 710(a)), under which appellant's petition was filed, provides:

> "Any alien who, after September 21, 1922, and prior to May 24, 1934, has married a citizen of the United States, . . . may, if eligible to naturalization, be naturalized upon full and complete compliance with all requirements. of the naturalization laws, with the following exceptions:
>
> (1) No declaration of intention shall be required;
>
> (2) In lieu of the five-year period of residence within the United States, and the six months' period of residence in the State where the petitioner resided at the time of filing the petition, the petitioner shall have resided continuously in the United States for at least one year immediately preceding the filing of the petition."[2]

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[2]Appellant was married to a native-born American citizen on June 25, 1927 [R. 1].

Section 307(a) of the Nationality Code (54 Stat. 1142, 8 U. S. C. 707(2)) provides:

> "No person, except as hereinafter provided in this chapter, shall be naturalized unless such petitioner, (1) immediately preceding the date of filing petition for naturalization has resided continuously within the United States for at least five years and within the State in which the petitioner resided at the time of filing the petition for at least six months, (2) has resided continuously within the United States from the date of the petition up to the time of admission to citizenship, and (3) during all the periods referred to in this subsection has been and still is a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States."

Statement of the Case.

PROCEEDINGS.

Appellant filed a petition for naturalization under Sec. 310(a) of the Nationality Act of 1940 in the District Court of the United States for the Southern District of California (Central Division) on September 25, 1945 [R. 1-4]. After a hearing upon the petition, the District Court sustained the Naturalization Examiner's objections to appellant's naturalization, and on February 5, 1947, denied the petition on the ground that appellant had failed "to establish his burden of proof of attachment to the principles of the Constitution of the United States and a favorable disposition to the good order and happiness of the United States" [R. 26].

FACTS.

Appellant immigrated to the United States with his mother from Russia in 1911 as a child of eleven [Tr. 210]. While attending Yale University he voluntarily enlisted and served in the United States Army in World War I [Tr. 211]. During his Army service he engaged in a ceremony which he believed had the effect of conferring naturalization upon him [Tr. 211, 214, 278-279, 282-284] and only found that his citizenship was not recorded when he attempted to comply with an announcement at the commencement of World War II that naturalized citizens should secure copies of naturalization certificates [Tr. 214-215, 278, 284-287].

Appellant graduated from Yale University in 1923 [Tr. 211], and after graduate work with a concomitant instructorship in history at the University of California, and a period of employment in religious work, he commenced teaching economics and history [Tr. 226] in 1929 at the Los Angeles Junior College, which thereafter became the Los Angeles City College [Tr. 213]. He served as an Associate Instructor [Tr. 36] until his resignation in 1940 [Tr. 216]. Since then, or at least until the District Court's denial of his petition for naturalization,[3] he was employed in making studies and surveys for Jewish social organizations, such as the study of personnel relations of Jewish employees which was being conducted at the time of the hearing [Tr. 222-223]. He lives with his wife, a native-born American citizen, whom he married in 1927 [Tr. 306-309] and his son, a student

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[3]It was indicated that appellant would lose his employment as a result of the District Court's judgment [Tr. 277, 77-78, 166, 317].

at the University of California [Tr. 76], in a residential neighborhood of Los Angeles [Tr. 145].

The appellant's witnesses included a number of teachers who had taught at the City College at the time of appellant's employment there and all but one of whom have continued on the faculty to the present time [Tr. 62, 107, 111, 114, 116, 132, 136, 147, 189, 207]; neighbors [Tr. 143, 174, 203, 208]; well-established business and professional men in the community [Tr. 140, 159, 164, 182, 186, 207, 208]; members and officers of veterans' [Tr. 55, 57, 121-122, 207]; and teachers' organizations [Tr. 52, 57, 59, 176, 206] to which appellant belonged, former students [Tr. 67, 151, 197], clerics [Tr. 70, 75], and his wife [Tr. 306].

It is clear from their testimony that appellant is a public-spirited person who participates in civic, community, and religious organizations, taking an interest in his profession and in educational problems, in current events, and in the welfare of the community [Tr. 54, 74, 122, 184, 213, 219, 270, 275]. In the field of education he believed in the benefit to students of a knowledge of all schools of thought; in teaching economics he gave a factual description of all economic theories and systems to enable his students to achieve a rounded and open minded approach to economic questions [Tr. 217, 220, 228, 114-115, 154, 197-200].

In his personal approach to economic questions he was an open-minded and serious thinker, without doctrinaire adherence to any school of thought [Tr. 180, 228-229, 265, 270; and see lecture, R. 6-8]. From his study of economics and of conditions during the depression it seemed

to him at that time that no lasting prosperity could be achieved by capitalist ownership of industry and that the welfare of the people required that capitalism be supplanted by public ownership. However, on the basis of the experience with producers' and consumers' cooperatives since 1935, and the cooperative efforts of industry during World War II, he now believes that the capitalist organization of industry can and should be maintained, with some modifications [Tr. 242, 258, 260, 265-266]. He had at all times faith and confidence in American principles, believing that the Government of the United States is the best in the world, though capable of improvement [Tr. 229]; opposing totalitarianism; possessing great respect for the Bill of Rights; and believing that the American people can and should achieve the greater economic well-being in which he was interested, through American principles, rather than through the abandonment of them [Tr. 169-170, 173, 190-192, 72-73, 112-114, 139, 128, 65, 77, 120-121, 166, 183-185].

As to appellant's family life, his wife testified that he had imparted a greater appreciation of the American way of life to her, who, as a native-born American citizen was accustomed to take it for granted [Tr. 308, 306-309]. He imparted his interest in religion to his son [Tr. 213 270, 166] who was described as "as American as apple pie", and as evidencing his attachment to American principles [Tr. 184, 76, 56, 307, 204].

The Government's evidence was directed at attempting to establish that the instruction given by appellant during his tenure at the City College and the opinions he held

at that time demonstrated a lack of attachment to the principles of the Constitution. However, despite numerous efforts to adduce testimony damaging to appellant, the only testimony the Government was able to elicit as to the actual content of his teaching or opinions was as follows:

One of his former students [Tr. 10, 13] called to testify against him could not remember his advocating any particular form of government or ever discussing forms of government, nor at any time advocating collectivism [Tr. 13]. Another student's only support for his opinion that appellant "stressed collectivism" [Tr. 15] was that appellant stated as "a boy, working in a factory, that he worked at one little item all the time. He thought that was the way it should be done, and there was greater success, . . . you could succeed faster, and get more work done by everyone working together, and doing a small part" [Tr. 16]. Another student maintained that appellant was "favorable to Communism and Socialism" because he had said that if "a truck was going down the street with a red flag on back (because) it had a load of pipe or lumber on it, and that the newspapers, particularly the Hearst newspapers, would jump at the conclusion that the truck driver was a dirty Red. This . . . was designed to make the student believe, after all, the word 'Red' was not such a bad word, and maybe we ought to check into it a little bit and make up our own minds" [Tr. 34-35]. And the head of the Social Science Department, Professor Cruse, who had sat in unannounced

to observe some of appellant's classes, admitted, despite the fact that he and appellant had always been opponents with respect to methods of teaching economics [Tr. 41], that he had never heard appellant discuss forms of government nor, it is to be inferred from the testimony, make any statement to his class reflecting his political or economic viewpoint [Tr. 37, 42].[4]

The Naturalization Examiner's major emphasis was upon a lecture delivered by appellant during the depression, in 1934 or 1935, as an extra-curricular activity [Tr. 233-234]. This lecture began with praise of the American way of life and with appellant's statement of his faith in the possibility of improving economic conditions and ending the then existing situation of unemployment and "scarcity in the midst of plenty" [R. 5-6]. After discussing the value of constant evaluation and re-examination of theories and trends [R. 6-8], appellant described the resources of the United States and the existing depression [R. 8-13]. He then discussed various theories

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[4]While there is no serious reference to appellant as a Communist, and the District Court did not find appellant held any Communist belief, the appellation is mentioned by some of the witnesses against appellant [See Tr. 82, 38]. The background of the testimony may therefore be briefly noted: during the '30s and particularly during the depression years, there were "conservative" and "liberal" groups among both the students and faculty. The "liberal" instructors, despite their inclusion of ardent anti-Communists, and despite the fact that they have survived continuing investigations of radical activity [Tr. 43-44, 96-97], were referred to as "Communists" by their opponents [Tr. 119, 114-115].

of organization of the economy, describing the booms and depressions of unregulated capitalism, the theory of state capitalism, and the basic principles of Fascism [R. 13-20]. He enunciated or quoted various criticisms of state capitalism and Fascism [R. 17-20] and then referred to collectivism as the antagonist of Fascism [R. 20]. He quoted the proponents of collectivism as proposing that "all resources, all lands and buildings, all manufacturing establishments, mines, railroads and other means of transportation and communication, should be, not private property but the common property of all those who work" [R. 20]. After outlining the stages through which the collectivist regarded it as necessary for society to pass in the development from capitalism to socialism, appellant concluded with the statement that "study and reflection could lead one to conclude that progress, human well being—civilization in brief, definitely and decidedly has little to fear, nay, it has much to expect, from a system of genuine socialization" [R. 24].

Appellant explained that he had not believed at the time of the delivery of this lecture that there could be a successful and permanent revival of capitalism, but that, as noted above (p. 6), in view of the introduction of some collectivist measures thereafter, such as the establishment of producers' and consumers' cooperatives, and cooperative measures during World War II to increase production, he now believed that capitalism, with modifications, can and should survive [Tr. 242, 258, 265, 266].

The District Court's Findings of Fact, Conclusions of Law, and Opinion.

With agreement of the parties, the District Court directed that its opinion constitute the findings of fact and conclusions of law [R. 26].

Findings of Fact.

The Court found that except for the inferences to be drawn from the testimony of Professors Cruse and Frankian, and of those of appellant's former students testifying against him, and from the lecture delivered by appellant in 1934 or 5, appellant had supported his burden of proving attachment to the principles of the Constitution [Tr. 386].

On the basis of such testimony and such lecture the Court found that appellant believed in "collectivism" and did not believe in capitalist ownership and direction of industry [Tr. 387, 392, 396]. This finding was based on the following subsidiary findings:

> Appellant did not establish that in his lecture he was "not seeking to impress any particular philosophy upon his auditors" [Tr. 388].
>
> As to the philosophy he sought to impress, the Court quoted the parts of the speech which it regarded as most significant.[5] Appellant, in the portion quoted by the Court, discussed the possibility of

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[5]The lecture commenced with a statement that appellant's ideal picture of the United States was of a "land of opportunity for all, a land of plenty, one, the resources of which were sufficient to wipe out needs, hardships, and poverty for all honestly willing to work; a land in which cooperation and social-mindedness could create all necessities and comforts for all" [Tr. 389]. This and a few accompanying remarks were not regarded by the District Court as showing a lack of attachment [Tr. 390].

stimulating a revival from the then existing depression [see Judge's comment as to then current conditions, Tr. 392] by public construction or similar schemes and stated that such a revival "would still have in it the inescapable capitalist tendency to generate a renewed depression" because of "'mal-distribution of income'" [Tr. 392]. This mal-distribution arose from the fact that "much too much profit went back to build new factories and too little found its way back to the people to buy the products from the factories we already had. . . . Too much was produced and too little was consumed in proportion as the margin between the value of goods produced and the value of goods consumed widened. . . .A boom under capitalism, which does not generate a new depression is impossible, since it is the inherent capitalist tendencies and contradictions that lead unavoidably to the logical slumps" [Tr. 393]. As a result, according to appellant, as quoted by the District Court, the historical view that capitalism should be entirely unregulated had been supplanted in recent years by advocacy of "a capitalist planned economic system" [Tr. 394]. But "capitalist planning" in appellant's view, was "highly paradoxical because planning involves the elimination of private enterprise and competition in the matter of kinds of goods produced . . . and so forth . . . (which are) the very props of capitalism [Tr. 395]. We cannot, consequently, build up much of a case for state capitalism" [Tr. 396].

Appellant then suggested that they take Fascism and Socialism "the newest arrivals into the laboratory and investigate the make-up and potentialities

and promises of each" [Tr. 397]. After discussing Fascism [Tr. 397], appellant stated that "the collectivist state, according to its proponents, in brief, proposes that 'all resources, all land and buildings, all manufacturing establishments, mines, railroads, and other means of transportation and communication . . . should be, not private property but the common property of all those who work'. It further proposes that . . . all members of society should be socially useful . . . that production and distribution of goods be planned scientifically to avoid anything resembling the crises of capitalist society. . . . But how is mankind to reach this state of practical idealism? The collectivist believes that it is necessary for society to go through four stages of development in the path from capitalism to socialism" [Tr. 398].

After describing these possible intermediate stages, appellant stated, according to the District Court's findings:

> "The last and final phase of this societal change will be the collectivist society—the ultimate goal. This time, coercive authority will have disappeared, everyone voluntarily participating in the co-operative commonwealth. This will be the real 'classless' society, with no wage system, no price, no money—a system based upon the principle of 'from each according to his ability, to each according to his need.' Thus, cryptly put, will evolve the state known as collectivism, a state which according to the prophetic, far-seeing vision of Karl Marx, is historically the logical outcome of a system of society that has outlived its usefulness, its mis-

sion, its place in history of economic growth of mankind. It is man's ultimate goal." [Tr. 399-400.]

Appellant then concluded:

"In conclusion may I say that the choice we are asked to make lies before us. If an economic system is to be judged on the basis of a worth-while standard of living for every man, woman and child under it, then we must choose accordingly. * * * economic planning for all is wholly inconsistent with, and impossible under, unchecked capitalism. On the other hand, this study and reflection could lead one to conclude that progress, human well being—civilization in brief, definitely and decidedly has little to fear, nay, it has much to expect, from a system of genuine socialization." [Tr. 400-401.]

The Court further found that appellant had not established that he had changed his attitude from that which he possessed at the time of his lecture [Tr. 401], and he was to be deemed to possess this attitude during the period here in issue: September 25, 1944 to September 25, 1945 [see Tr. 2].

Conclusions of Law and Opinion in Support Thereof.

The District Court concluded that the burden of proving attachment to the principles of the Constitution is upon the appellant [Tr. 385-386, 402-403].

The Court concluded that appellant had not established that he did not believe in economic "collectivism."

The Court concluded that "collectivism" is not consistent with the principles of the Constitution and that because of appellant's belief in "collectivism" he was not to

be deemed attached to the principles of the Constitution and well disposed to the good order and happiness of the people of the United States [Tr. 386, 402].

The District Court expressed the opinion that the economic and property relations existing under capitalist ownership and direction of industry were to be deemed a part of the processes of Government of the United States and were dictated by the Constitution to be a part of such processes [Tr. 387, 392, 396].[6]

Specification of Errors.

The District Court erred

1. In its findings of fact that appellant continued to possess the belief in "collectivism" of industry, which the Court deemed inconsistent with the principles of the Constitution, during the period in which the statute required appellant's attachment to such principles of the Constitution: that is, September 25, 1944 to September 25, 1945; and the District Court therefore erred in its conclusion, on the basis of such finding, that appellant had not sustained the burden of proving such attachment.

2. In its conclusion of law that the belief in "collectivism" of industry which it found appellant to possess is inconsistent with the principles of the Constitution, and in its holding on the basis of such conclusion that appellant had not sustained the burden of proving attachment to such principles.

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[6]Thus, the Court stated, on the basis of appellant's statement that the depressions were inevitable under capitalism, that appellant believed the results would be "disaster" no matter "how the processes under the Constitution shall be invoked or employed" [Tr. 396] and such a criticism of capitalism, the District Judge believed, showed a tendency not to "support . . . the government of the United States, under the Constitution" [Tr. 392].

POINTS TO BE ARGUED AND SUMMARY OF ARGUMENT.

I. **Assuming the Validity of the District Court's Conclusion That the Belief in Collectivism Appellant Possessed in 1934 Was Inconsistent With the Principles of the Constitution, the District Court Erred in Its Finding That Appellant Continued to Possess Such Belief During the Year Prior to His Petition. The Court Therefore Erred in Its Conclusion on the Basis of This Finding That He Was Not Attached to Such Principles During This Period.**

We emphatically believe, and shall demonstrate in Point II, that the belief in collectivism which the District Judge attributed to appellant cannot, as a matter of law, be deemed to indicate a lack of attachment to the principles of the Constitution. However, purely *arguendo,* we are assuming in this point that it could be so deemed.

The only support for the finding that appellant believed in the inability of the capitalist organization of industry to survive and to maintain prosperity, and in the necessity for supplanting it with collectivism, is the lecture he delivered in 1934 or 5. While the testimony of two students relates to the appellant's teaching until as late as 1940 and the testimony of one professor may also so relate, the testimony of these and the few other student and teacher witnesses against appellant is too self-contradictory, vague and insubstantial to be deemed support for a finding that the beliefs he possessed in 1934 or 5 continued. The inference which might be drawn in the absence of evidence to the contrary that the beliefs he then held continued, is refuted by uncontradicted, credible, and convincing evidence which the District Court without justification ignored. Accordingly, appellant sustained the burden of proof, if it rested upon him, that he did not hold in 1944

the beliefs he may have possessed in 1934 or 5 as to collectivism. Inasmuch as the District Court found that but for such beliefs, appellant sustained the burden of proving attachment, it must be held that he sustained such burden.

II. Assuming the Validity of the District Court's Findings of Fact, It Erred in Its Interpretation of the Principles of the Constitution, and It Consequently Erred in Its Holding That Appellant Was Not Attached to Such Principles and Was Not Well Disposed to the Good Order and Happiness of the United States Within the Meaning of the Naturalization Law.

It is established by the decision of the Supreme Court in *Schneiderman v. United States,* 320 U. S. 118, that a belief in the necessity of economic change of an even more drastic nature than that which the District Court attributed to appellant, is consistent with the principles of the Constitution to which attachment is required by the naturalization law; and the *Schneiderman* ruling is controlling on this question of law in the instant case. Accordingly, appellant's purported belief cannot be deemed to indicate a lack of attachment to the Constitution, and inasmuch as the District Court ruled that but for such belief appellant had carried the burden of proving attachment to the Constitution, appellant must be deemed to have established such attachment.

The District Court did not find that appellant believed in change in the political organization of the government of the United States; such a finding would not in any event have support in the evidence. Furthermore, the only mention of political action which, *arguendo,* could possibly be considered to represent appellant's belief, is consistent with the principles of the Constitution under the *Schneiderman* decision.

POINT I.

Assuming the Validity of the District Court's Conclusion That the Belief in Collectivism Appellant Possessed in 1934 Was Inconsistent With the Principles of the Constitution, the District Court Erred in Its Finding That Appellant Continued to Possess Such Belief During the Year Prior to His Petition. The Court Therefore Erred in Its Conclusion on the Basis of This Finding That He Was Not Attached to Such Principles During This Period.

Assuming, *arguendo,* that belief in a collectivist organization of the economy and in public rather than private ownership of industry is tantamount to a lack of attachment to the Constitution, we submit that the finding that appellant held such beliefs in the period from September, 1944 to September, 1945, is clearly erroneous. While we concede, in view of the weight to be accorded to the District Court's findings, that the lecture delivered by appellant in 1934 or 5 supports the view that he then did not believe in the future of capitalism, and believed that collectivist ownership of industry was essential for a stable prosperity, there is no evidence to support the finding that he possessed such beliefs after that time.

While the District Court refers to the testimony of former students who testified for the Government, and of Professors Cruse and Frankian as corroborating the fact that appellant possessed the views expressed in the lecture, such testimony is entirely lacking in substance. Professor Cruse admitted that in his observation of appellant's classes he had never heard appellant express any viewpoint whatsoever [Tr. 37, 41-42], and the most positive adverse statement the Naturalization Examiner could

elicit from Professor Cruse as to appellant's views was as follows:

> "Q. As to Mr. Wixman's views about Communism, were they favorable or unfavorable, as you remember them? A. As a general principle I felt that Mr. Wixman rather favored the idealogy of Communism.
>
> Q. Is there anything that you can recall that led you to feel that? A. There is nothing other than the general opinion you get from discussing the subject with any individual." [Tr. 38.]

And this testimony must be evaluated in the light of Professor Cruse's own admission that in fact he knew "not at all what the political faith of Mr. Wixman is" [Tr. 41], and his statement that his and appellant's views were out of harmony in general [Tr. 38] and on the question of teaching methods [Tr. 4]; such a general bias against the appellant cannot be ignored as a factor further discounting the probative force of Professor Cruse's already insubstantial, vague, and self-contradictory testimony.

As to the other professor-witness against appellant, although he had visited in appellant's home [Tr. 83], he was apparently unable to recall any expression of view by appellant indicative of a belief in econonmic or political change. All that could be elicited from him as to appellant's views was:

> "Q. Did you ever have any conversation with Mr. Wixman which involved political economic questions? A. No, not that I recall.
>
> Q. Specifically, did you ever discuss the subject of Communism? A. No.

Q. Did anyone else ever discuss Mr. Wixman with you? A. I have had a number of students complain about him.

Mr. Ganahl: Just a minute. I object to that * * * when it goes as far as to say John Doe told Richard Roe who told me John Doe said something, then it certainly has its limitations. * * * I might make the suggestion that we had here this morning a number of students, and those students reported to this witness. Why can't they be brought in?

The Court: I don't know.

Mr. Ganahl: I would like to object upon the ground that it is irrelevant, and hearsay.

The Court: Objection overruled.

The Witness: It was common belief on the campus by a great many students that he was a Red.

The Court: Upon what do you base that deduction you have, Professor?

The Witness: Your Honor, when they come and say, 'Well, we heard another lecture on Communism,' —they might have been exaggerating, I don't know, but I am of the belief that where there is smoke there is fire. It was not from one person. It was a number of persons. If you should ask me who those people are I could not recall names ten or twelve years later, but that was my direct impression." [Tr. 81-82.]

The statement quoted from these students apparently merely meant that they did not share appellent's view that enlightenment on all theories was desirable [Tr. 217, 228; see also 114-115, 159, 197-200]; for in spite of their ob-

vious bias, they could not even find any basis for alleging that appellant was advocating any particular theory [Tr. 90]. And Professor Frankian admitted in effect that he based his view of appellant on conversations only with those students who disliked appellant [Tr. 83] and to whom he was a faculty adviser [Tr. 85]. The fact that his informants were only a small selected group who found common ground with Frankian by reason of their disapproval of appellant also seems apparent from the fact that while he concluded from his group that appellant's reputation on the campus was "not very good" [Tr. 82] the instructor who interviewed most of the students in the school in connection with their vocational guidance testified that he was generally highly regarded [Tr. 136-137, 139-140; compare 189-190]. It also seems apparent that Professor Frankian, with Professor Cruse, was intent on "getting" something on appellant [Tr. 88] and that the students who conferred with Frankian about appellant shared this view [Tr. 90].

As to the student-witnesses against appellant, it is not an exaggeration to state that their testimony is even less substantial than that of the professors. While one student gave it as his opinion that appellant was "favorable to Communism and Socialism," the meaning of this generalization is illuminated by the student's view that appellant showed such favoritism because appellant had suggested that the students should make up their own minds as to whether a person was a "Red" if he was so labeled in a rash and prejudiced manner [Tr. 34-35]. From an-

other student the opinion was elicited that he regarded appellant as a "collectivist." That this opinion was entirely lacking in probative value is demonstrated by this student's explanation that appellant's collectivist belief was demonstrated by appellant's remarking on the efficiency of specialization of labor [Tr. 16].

Further, the testimony of both must be weighed against their background of immaturity [Tr. 47, 21, 194] and the fact that as a result, they might have regarded appellant's attempt to give an objective description of various schools of thought as advocacy. The latter inference is strengthened by the fact that neither Professor Cruse, who observed appellant's classes, nor Professor Frankian, who conveyed reports from numerous students, nor an American Legion investigator who had student informers [Tr. 95-98], could refer to any instance of advocacy of any belief by appellant. Furthermore, other students, both appearing for the Government and for appellant and another professor, testified that they knew of no such advocacy, and that appellant had discussed all theories in a scientific and objective manner [Government's witness, Tr. 26; appellant's witnesses, Tr. 154, 197-200, 114].[7]

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[7]It may be observed that the view of the two students quoted above that appellant "favored" some of the theories he described may have been because of the contrast between his teaching and that of Professor Cruse who, while supplying his students with a reading list similar to appellant's, seems to have emphasized his condemnation of the views of those authors with whom he disagreed [Tr. 42].

Finally, besides the contradictions and vagueness of the testimony against appellant, it must be weighed against the setting of the times; the strength of feeling during the depression against those of differing views; the factionalism at the College with "liberals", including anti-Communists termed Communists [Tr. 114-115, 109, 119, 190-192]; a pro-Nazi movement [Tr. 305]; and a continuous investigation of radical activities with students utilized as informants [Tr. 95-97], with all of the gossip and rumor that such utilization would inevitably entail.

Even without this background, which throws considerable light on the obvious exaggerations in the testimony, we submit, with due deference to the District Court, that the generalities and conjectures of these witnesses cannot be deemed evidence to support a finding. It is also to be borne in mind that none of these witnesses was acquainted with appellant subsequent to the termination of his teaching in 1940, and Professor Frankian explicitly related his testimony to the years from 1935 to 1937. Thus, we submit that there is no testimony sufficient to support a finding that appellant believed in collectivism in the year of 1944-45. While the lower Court's consideration of the evidence carries great weight, its finding cannot be supported if it has failed to discount obviously contradictory and incredible testimony and if there is no supporting evidence properly deemed of probative value. Compare *In re Bogunovic,* 18 Cal. (2d) 160, 114 P. (2d) 581; *Weber v. United States,* 119 F. (2d) 932 (C. C. A. 9, 1941).

Accordingly, the only support for the conclusion that appellant disbelieved in a capitalist economy in 1944-45 is the inference which might be drawn in the absence of evidence to the contrary that the beliefs he held in 1934 continued until that time. This inference, however, is refuted by credible, uncontradicted, and convincing evidence which the District Court ignored.

Appellant testified, without contradiction, that while he had not believed in 1934 that a stable prosperity could be maintained under private ownership of industry, the formation of producers' and consumers' cooperatives since 1934 and cooperative efforts during World War II had shown that capitalism could be modified and revived and that he had therefore altered the view he had held as to the future of capitalism during the depression of the 30's [Tr. 242, 258-259, 265]. Considering appellant's role as a student and observer of economic phenomena, evident in the lecture and the record as a whole, the fact that he was not a doctrinaire follower of any school of thought [Tr. 180, 228-229, 270, and R. 6-8]; that even the lecture in 1934 in the first instance, while favoring a socialist economy at that time, was not given in a dogmatic vein; the frequency of changing diagnoses of our economic difficulties by many experts over the last decades in correspondence with economic developments; the appellant's lack of evasiveness in his testimony as to his views—considering all of these factors, appellant's testimony is highly credible. Indeed, the Court gave no indication in its findings or otherwise that it deemed appel-

lant other than veracious; and the Court cannot ignore uncontradicted testimony by the petitioner without grounds therefor. Compare *Schneiderman v. United States,* 320 U. S. 118, 141-142.

Further, appellant's testimony is supported by that of several witnesses whom the District Judge found were "very reputable and responsible" [Tr. 401]; they had engaged in discussions of viewpoint with appellant in recent years, and appellant had seemed to them to support the right to private property and not to advote a collectivist ownership of property [Tr. 173-174, 190-192, 135-136, 72-73]. It is true that some of the appellant's witnesses had not engaged in an exchange of views with him; but in characterizing the testimony of all of appellant's witnesses as "negative" [Tr. 40], the District Judge ignored the testimony of those who had so engaged.

In summary, we submit that the finding that the belief appellant possessed in 1934 continued until 1944 has no support other than the assumption that a once-held belief continues; that this assumption is fully refuted by the evidence submitted by appellant; and that appellant has fully sustained the burden of proof, if it be his to sustain, that he did not continue to possess such belief in 1944-45. Accordingly the finding must be reversed as clearly erroneous; and since but for this finding the District Judge found that appellant had sustained the burden of proving attachment to the Constitution [Tr. 386, 401], he must be deemed to have sustained that burden.

POINT II.

Assuming the Validity of the District Court's Findings of Fact, the Court Erred in Its Interpretation of the Principles of the Constitution of the United States, and It Consequently Erred in Holding That Appellant Was Not Attached to Such Principles and Was Not Well Disposed to the Good Order and Happiness of the United States, Within the Meaning of the Naturalization Law.

We do not dispute the District Court's finding that at the time of appellant's 1934 lecture, on which the District Court's holding was largely based, appellant favored increased prosperity for the majority of the population through "collectivist" measures and that he was then highly pessimistic as to the possibility of securing lasting prosperity for this country under capitalist ownership of industry. And we shall assume *arguendo,* though we submit we have established the contrary in Point I, that the beliefs held by appellant in 1934 have continued to the present time. We believe, however, that such beliefs, which the District Court held to be contrary to the principles of the Constitution, are consistent therewith under clear, definitive, and controlling rulings of the Supreme Court; the District Court therefore erred in holding that the possession of such beliefs established appellant's lack of attachment to the Constitution.

In *Schneiderman v. United States,* 320 U. S. 118, the Supreme Court made a complete exploration of the social, economic, and political principles to which an alien must be attached to be eligible for naturalization. It is clear, as will be demonstrated below, that the principles which the District Court held to negative attachment to the Constitution are not contrary to the "principles of the Consti-

tution", according to the ruling in that case, or even according to the more stringent rule propounded by the dissenting minority therein. And the question involved in the case at bar is wholly governed by the *Schneiderman* holding. It is true, as the District Judge pointed out [Tr. 312, 385], that the portion of the *Schneiderman* opinion dealing with weight of the evidence and burden of proof relates only to denaturalization and is inapplicable to the instant proceeding. But its answer to the question: "What are 'the principles of the Constitution' to which attachment is required for naturalization?"—is obviously controlling on this question of law regardless of the nature of the proceeding. And the appellant, yielding *arguendo* to the District Judge's finding of fact as to his belief in collectivism, is here challenging the District Judge's conclusion only on this question of law. As the Supreme Court stated in the *Schneiderman* opinion: "To apply the statutory requirement of attachment correctly to the proof adduced, it is necessary to ascertain its meaning" (302 U. S. at p. 133). In this Point we are not questioning the proof adduced but only the meaning the District Court gave to the statutory requirement.

At the outset, and of primary importance in the instant case or in any consideration of the content of "principles of the Constitution", is the Supreme Court's opinion on the extent to which a belief in improvement through change in existing conditions is countenanced by the Constitution. On this point the Court stated in the *Schneiderman* opinion:

> "The constitutional fathers, fresh from a revolution, did not forge a political straitjacket for the generations to come. Instead they wrote Article V and the First Amendment, guaranteeing freedom of

> thought, soon followed. Article V contains procedural provisions for constitutional change by amendment without any present limitation whatsoever except that no State may be deprived of equal representation in the Senate without its consent. . . . This provision and the many important and far-reaching changes made in the Constitution since 1787 refute the idea that attachment to any particular provision or provisions is essential, or that one who advocates radical change is necessarily not attached to the Constitution. . . . As Justice Holmes said, 'Surely it cannot show lack of attachment to the principles of the Constitution that . . . (one) thinks it can be improved' . . . Criticism of, and the sincerity of desires to improve the Constitution should not be judged by conformity to prevailing thought because, 'if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought'." (320 U. S. 137-138.)

Thus, and this is a view to which the dissenters likewise adhered,[8] the "principles of the Constitution" countenance a belief even in the abrogation of some of its explicit provisions for one of those very principles is freedom to consider, advocate, and effect changes in the Constitution and in existing conditions. It is only the general system of government, of the United States, rather than the particulars of the pattern existing thereunder at any particular time, to which the naturalization law requires attachment. The doctrine applied in the *Schneiderman* decision that the "principles of the Constitution" within the meaning of the naturalization law, do not preclude, and in fact encourage, a belief in change and growth through

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[8]See dissenting opinion, 320 U. S. at p. 195.

freedom of thought, was also influential in the holding in *Girouard v. United States,* 328 U. S. 61, overruling *United States v. Schwimmer,* 279 U. S. 644, and *United States v. MacIntosh,* 283 U. S. 605.[9] To like effect, see *Baumgartner v. United States,* 322 U. S. 665.

This view of the "principles of the Constitution" is but another expression of the traditional philosophy that "It is a Constitution we are expounding." For it is an instrument with the breadth and flexibility to permit of adoption to the exigencies of "the changing course of events" (Stone, C. J., in *United States v. Classic,* 383 U. S. 299, 316). And as a corollary of the philosophy that it is through adaptability that our Constitution and government can endure, stands the primary principle of the Constitution "that the ultimate good desired is better reached by free trade in ideas . . ." (Holmes, J., dissenting in *Abrams v. United States,* 250 U. S. 616, 630.)[10]

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[9]In the *Girouard* case, the Court, by Douglas, J., quoted the Holmes dissent in the *Schwimmer* case with respect to the principle of thought; and it overruled the holdings in the earlier cases that the "duty by force of arms to defend our government . . . is a fundamental principle of the Constitution" (*Schwimmer* opinion, at p. 650), stating that the government may be defended in other ways and that willingness to bear arms is not essential to attachment to our institutions.

The less inclusive view of the principles of the Constitution adopted in these recent decisions will prevent a situation such as that in *United States v. Villaneauva,* 17 Fed. Supp. 485 (D. Nev. 1936) dealing with a petition for naturalization during the existence of the prohibition amendment and reapplication after repeal.

[10]Thus, the authors of the Constitution "chose (by the First Amendment) to encourage a freedom which they believed essential if vigorous enlightenment was ever to triumph over slothful ignorance" (Black, J., in *Martin v. Struthers,* 319 U. S. 141, 143.) As to the purpose of this Amendment, see also Jackson, J., in *Board of Education v. Barnette,* 319 U. S. 624, 642, stating that the "freedom to differ" includes "the right to differ as to things that touch the heart of the existing order."

As to the particular type of economic change which the District Court found appellant to favor, the Supreme Court held clearly and definitively in the *Schneiderman* case that a belief in such change is consistent with the principles of the Constitution to which the naturalization law requires attachment. For the District Court based its judgment on its finding that appellant believed in "collectivism", finding that but for this belief he had sustained the burden of proving attachment [Tr. 386]. And by "collectivism", the District Judge referred to the abrogation of the ownership and control of production by private industrialists—the salient feature of capitalism—and the substitution therefor of public ownership of industry (see Findings of Fact and Conclusions of Law, *supra,* pp. 10 and 13). That this is the meaning of "collectivism" as used by the District Judge is clear not only from his opinion but from his other statements in the record as to capitalism and collectivism and the latter's inconsistency with constitutional principles [Tr. 239-240, 243, 287, 292, 295, 296-299]; from the thrust of the questioning of appellant as to his economic beliefs [Tr. 297-8, 287, 228, 263-264, 265]; and from the usages of the term by the appellant in his lecture and in his testimony [Tr. 91-292, 263-264, 258].

While the beliefs involved in the *Schneiderman* case envisaged for more drastic changes than did the belief the District Court attributed to appellant, the Supreme Court had occasion there to hold *inter alia* as to the consistency with the Constitution of a belief in collectivism. And the Supreme Court held that the present method of capitalist ownership of industry is not guaranteed by the Constitution nor to be deemed a principle of it, and that public or

collectivist ownership is not contrary to such principles. On this point the Court stated:

> "It is true that the Fifth Amendment protects private property, even against taking for public use without compensation. But throughout our history many sincere people whose attachment to the general constitutional scheme cannot be doubted have, for various and even divergent reasons, urged differing degrees of government ownership and control of natural resources, basic means of production, and banks and the media of exchange, either with or without compensation. And something once regarded as a species of private property was abolished without compensating the owners when the institution of slavery was forbidden. Can it be said that the author of the Emancipation Proclamation and the supporters of the Thirteenth Amendment were not attached to the Constitution?" (320 U. S. at 141.)

And it is to be noted that the minority, while taking the position that compensation to the owners of property appropriated by the State was required by the principles of the Constitution, indicated that such appropriation was consistent with these principles if compensation was made. (See 320 U. S. at pp. 181, 194.) In the instant case, there is no indication in the findings that appellant did not believe in such compensation and the only evidence in the record on this point is that he did [Tr. 265].

While it is presumptuous on our part to consider the support for a point on which the Supreme Court has so clearly held, we submit that the taking of private property for public use is restrained under the Constitution as it now stands only by the due process clause requirement that the taking be reasonably necessary for the public welfare

and that compensation be paid. Thus, even assuming that these restraints were to be deemed part of the immutable principles of the Constitution (an assumption in part negatived by the majority in the *Schneiderman* case), belief in the collective ownership of industry is in no way inconsistent with the Constitution. This is particularly true since such belief is premised on the view that the transition from private to public ownership is reasonably necessary, in fact indispensable, to the public welfare. That this transition has been made frequently throughout our history—the obvious example being the present Government conduct of the carriage of the mails—is commonplace knowledge.[10a]

NO FINDINGS THAT APPELLANT BELIEVED IN ANY POLITICAL CHANGE

It cannot reasonably be inferred from the District Court's opinion[11] that it found appellant to possess any belief as to political change, and it is therefore unnecessary to consider the doctrine as to what political objectives are inconsistent with the principles of the Constitution. For the sole reference in the opinion to possible methods of achieving political change is in the passage which the District Judge read from appellant's lecture in which he quotes the stages which the proponents of collectivism state would be followed in the development from capitalism to

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[10a]If public ownership were undertaken by the Federal Government, it would of course have to bear a reasonable relation to one of that Government's Constitutional objectives, such as the advancement of commerce.

[11]Compare *Stubbs v. Fulton National Bank of Atlanta*, 146 F. (2d) 588, 560 (C. C. A. 6, 1945); *Kuhn v. Princess Lida of Thurn and Taxis*, 119 F. (2d) 704, 705-706 (C. C. A. 3, 1941).

socialism. It seems clear that there was no intention on the part of the District Judge to find that this passage represented appellant's belief, for he makes no comment with respect to it, discussing only, as pointed out above, appellant's economic viewpoint, his belief in collectivism, and his pessimism about prosperity under capitalist ownership and direction of industry. This omission must be deemed deliberate in view of several attempts by the Naturalization Examiner to indicate that appellant believed in a change in political forms.[12]

To attribute to the District Court a finding that appellant had any belief as to political change that it deemed inconsistent with the Constitution would, we believe, be setting up a strawman to knock it down, for such a finding would require reversal as clearly erroneous. For there is not a word of testimony in the record as to appellant having any belief as to political forms other than a belief in democracy and the Bill of Rights, and abundant testimony that he did so believe; he believed in bettering our economic welfare through the observance of American principles rather than through their abandonment [Tr. 169-

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[12]Furthermore, the District Judge states that his conclusion that appellant possessed a belief inconsistent with the principles of the Constitution is based on the lecture as corroborated by the testimony of the professors and the students [Tr. 386]; since there is no testimony as to appellant's belief in any political method for achieving economic change, the finding as to appellant's belief could hardly have been intended to include a finding that he believed in any particular political method.

170, 173, 190-192, 72-73, 112-114, 139], considering the government of the United States to be the best in the world [Tr. 229; and see p. 6, *supra*].

As to attributing to appellant the point of view quoted in his lecture as to the possible development and political results of collectivism, it is to be noted that such viewpoint related to far-distant and ultimate developments. Accordingly, even if appellant, instead of discussing this view academically, had himself possessed it, it would have been subject to change in the light of intervening developments long before the period under discussion.

Thus a finding that appellant believed in 1944-45 in achieving collectivism through the political methods mentioned in his 1934 speech would have been clearly erroneous because it would have been based solely on an academic statement he made eleven years before that some theoreticians believed in a theory of methods to be used in the indefinite future, and because, moreover, appellant was an ~~electric~~ eclectic thinker (see *supra*, p. 23), who was not in any event closely identified with such theorists.

It is to be noted that even if a finding had been made that appellant believed in the political methods mentioned in the 1934 lecture and even if the finding were supported, such belief would not be inconsistent with the principles of the Constitution as declared by the Supreme Court. For it would seem that the view under discussion, in the lecture described, foresaw in general that the changes being ~~advocated~~ would be affected through the existing pattern of political organiza-

tion;[13] and even "aims (that) are energetically radical", may be sought within "the framework of democratic and constitutional government" (*Bridges v. Wixon,* 326 U. S. 135, compare *United States v. Rossler,* 144 F. (2d) 463 (C. C. A. 2, 1944)). In any event it is uncontrovertible that "no present violent action" was called for. On this point the Supreme Court, again emphasizing the need for "freedom of thought" (320 U. S. at p. 158), stated in the *Schneiderman* decision:

> "There is a material difference between agitation and exhortation calling for present violent action which creates a clear and present danger of public disorder or other substantive evil, and mere doctrinal justification or prediction of the use of force under hypothetical conditions at some indefinite future time —prediction that is not calculated or intended to be

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[13]For, while the theory appellant cites refers to the "dictatorship of the masses," it appears, as the Supreme Court stated, that such "dictatorship" refers to "control by a class, not a dictatorship in the sense of absolute and total rule by one individual" (*Schneiderman v. United States,* at p. 142). Such control does not necessarily involve "the end of representative government or the federal system" and so long as it does not do so, it is not inconsistent with the principles of the Constitution (*ibid*). And since under the theory of the collectivists, the "masses" are synonymous with the majority of the population [See Tr. 398], control by the masses is entirely consistent with the continuance of representative government. The fact that the government is to serve "as far as possible for the advantage of the working-class" is not incompatible with the Constitution (*Schneiderman v. United States* at p. 141), particularly inasmuch as it is, by definition, the majority. And even if force must be used by the majority to maintain itself in power, this is not inconsistent with the Constitution (*ibid* at p. 157), since police measures by a government representing the majority against a rebellious minority are not anti-democratic.

presently acted upon, thus leaving opportunity for general discussion and the calm processes of thought and reason. . . . Because of this difference we may assume that Congress intended, by the general test of 'attachment' in the 1906 Act, to deny naturalization to persons falling into the first category but not to those in the second." (320 U. S. 157-158.)[14]

Finally, though it is unnecessary for the purposes of the case at bar to press this argument, it is to be observed that if the naturalization law were interpreted so as to prohibit naturalization of those who merely discussed change —even if the change were inconsistent with the Constitution—without creating "a clear and present danger" of affecting it, a serious question as to the constitutionality of the law would be raised.[15]

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[14]It is also to be noted that even the belief the District Court found appellant to possess as to economic change from capitalist to collectivist control of industry (discussed *supra*) did not encompass a belief in the need for immediate effectuation of such a change.

[15]Though naturalization is a "privilege," the grant of the privilege cannot be conditioned upon the non-exercise of constitutional rights. Compare *Frost v. Railroad Commission of California*, 271 U. S. 583, 594; *Hague v. C. I. O.*, 307 U. S. 496, 515; *Murdock v. Pennsylvania*, 319 U. S. 105, 110-111. The guarantee of free speech extends to alien as well as citizen (*Bridges v. Wixon*, 326 U. S. 135), and such guarantee permits restraint of speech only when such speech presents a clear and present danger of a substantive evil the legislature has the right to prevent. *Thomas v. Collins*, 323 U. S. 516, 530; *Bridges v. California*, 314 U. S. 252, 263; *Thornhill v. Alabama*, 310 U. S. 88, 104. Thus, if the "principles of the Constitution," within the meaning of the naturalization law were construed so as to negative attachment to the Constitution on the basis of speech which did not create such danger, the law would force the alien to forego his constitutional right to free speech in order to establish his eligibility for naturalization; and the law would for this reason be unconstitutional.

In summary, the District Court erred as a matter of law in its conclusion that the belief in collectivism it found appellant to possess was inconsistent with the principles of the Constitution within the meaning of the naturalization law, and was evidence of lack of attachment to such principles because (1) a belief in the desirability of change in existing conditions is not only consistent with the "principles of the Constitution" but is encouraged by the Constitution's underlying philosophy of flexibility to meet the exigencies of changing times, and by its basic principle of the value of a free trade in ideas; (2) the "principles of the Constitution" do not prohibit a transition from private capitalist, to public collectivist, ownership and direction of industry and a belief in the desirability of the latter is in no way inconsistent with such principles and cannot therefore be deemed evidence of a lack of attachment thereto; (3) the District Court did not find that appellant possessed any belief as to political methods which it deemed inconsistent with the Constitution; any such finding would be unsupported; and the only belief as to political methods which could possibly be attributed to appellant was in any event consistent with the principles of the Constitution.

Conclusion.

We respectfully submit that the District Court erred both in its findings of fact and conclusions of law and that its judgment should be reversed.

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No. 11599

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

SAMUEL MORRIS WIXMAN, also known as SHULIM WIXMAN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE.

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No. 11599

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SAMUEL MORRIS WIXMAN, also known as SHULIM WIXMAN,

Appellant,

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UNITED STATES OF AMERICA,

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BRIEF OF APPELLEE.

Jurisdiction.

Appellee adopts the statement of appellant concerning jurisdiction.

Statement of the Case.

Appellant's statement of "proceeding" is adopted herein as set forth at page 3 of Appellant's brief.

Appellant's statement of facts is not adopted. The essential facts are stated herein as follows: Appellant was born in Russia on July 25, 1900 [R. 4a]. He emi-

grated to the United States from Russia in 1911 and has since resided in this country. Appellant married a United States citizen in 1927. He has one native born child [R. 4a]. He graduated from Yale University in 1923 [Tr. 211]. During the time he was enrolled at Yale University, he was a member of the armed forces of this country for about one year during World War I. From 1929 until 1940 he taught economics and history in the Los Angeles Junior College, which thereafter became the Los Angeles City College [Tr. 213, 226]. Since 1940 Appellant states he has been employed in making studies and surveys for social organizations [Tr. 222-223].

Discussion of documentary evidence and the testimony of witnesses will be covered under the headnote "evidence and testimony" *infra,* in the argument.

SUMMARY OF ARGUMENT.

POINT I.

The Trial Court Was Justified in Considering the Behavior and the Expressed Mental Attitude of the Alien Appellant Prior to the Commencement of the One-Year Period Immediately Preceding His Petition for Naturalization in Determining His Fitness for a Grant of Citizenship.

The requirement of the establishment of the qualifications for naturalization during the statutory period of residence of one year immediately preceding the date of filing petition for naturalization relates to the minimum proof that must be established by the alien seeking naturalization. The period of the alien's life into which the Court may inquire in determining fitness for naturalization is not so statutorily circumscribed. The mental attitude and beliefs of the Appellant as expressed by him in 1934 or 1935 were inconsistent with a showing of attachment to the principles of the Constitution and of being well disposed to the good order and happiness of the United States. It was, therefore, incumbent upon the Appellant to establish to the satisfaction of the Court that he had in good faith changed from his earlier mental convictions. This he must do by affirmative evidence.

POINT II.

The Trial Court Was Correct in Its Interpretation of the Principles of the Constitution, and in Concluding That Appellant's Views Were Contrary to Such Principles, Within the Meaning of the Naturalization Laws.

The decision of the Supreme Court in *Schneiderman v. U. S.*, 320 U. S. 118, 63 S. Ct. 1333, cannot be taken as a test to be applied in a proceeding in which an alien is seeking naturalization to determine his attachment and disposition to the good order and happiness of the United States. The test used there is one applied where the proceeding is to take away the status of citizenship.

ARGUMENT.

POINT I.

The Trial Court Was Justified in Considering the Behavior and the Expressed Mental Attitude of the Alien Appellant Prior to the Commencement of the One Year Period Immediately Preceding His Petition for Naturalization in Determining His Fitness for a Grant of Citizenship.

Under the general statute relating to naturalization[1] "No person * * * shall be naturalized unless such petitioner, (1) immediately preceding the date of filing petition for naturalization has resided continuously within the United States for at least five years * * * (2) has resided continuously within the United States from the date of the petition up to the time of admission to citizenship, and (3) during all the periods referred to in this subsection has been and still is a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States."

As the husband of a citizen Appellant was entitled to certain exemptions from the requirements of the foregoing general statute which, *inter alia,* reduces the period of residence to one year:[2]

> "(2) In lieu of the five-year period of residence within the United States, * * * the petitioner

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[1]Sec. 307, Nationality Act of 1940 (54 Stat. 1142; 8 U. S. C. 707).

[2]Sec. 310(a), Nationality Act of 1940 (54 Stat. 1144; 8 U. S. C. 710).

shall have resided continuously in the United States for at least one year immediately preceding the filing of the petition."

The statutory requirement with respect to residence and a showing of being well disposed and attached during the period of residence, merely fixes the minimum requirement which petitioners for citizenship must meet, but is not a restriction upon the Court to that period of residence in its inquiry concerning the fitness of the petitioner for citizenship.

The Court has the duty to see to it that the petitioner measures up to this minimum requirement otherwise the Court is bound to deny naturalization. Congress has stated in clear terms that "A person may be naturalized as a citizen of the United States in the manner and under the conditions prescribed in this Act, *and not otherwise.*"[3] "Courts are without authority to sanction changes or modifications; their duty is rigidly to enforce the legislative will in respect of a matter so vital to the public welfare."[4]

Appellant's contention (Br. 15, 17)[5] that the Court erred in considering matters occurring outside the one year period has no judicial support and is opposed to public policy.

The question for the determination of the trial court was not whether the Government had presented evidence

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[3]Sec. 301(a), Nationality Act of 1940 (54 Stat. 1140; 8 U. S. C. 701).

[4]*U. S. v. Ginsberg*, 37 S. Ct. 422, 425, 243 U. S. 472, 475, 61 L. Ed. 853.

[5]The abbreviation "Br." when used herein refers to Appellant's brief.

to establish a continued belief during the year 1944-1945 in the ideologies espoused by Appellant in his lecture in 1934 or 1935 as contended by Appellant (Br. 15, 17, 22), but rather whether Appellant could establish by any convincing proof that he had in good faith changed from his earlier expressed mental convictions. By whatever term they may be designated, the trial court concluded that the ideologies admittedly advocated as his own in 1934 or 1935, fell short of establishing to its satisfaction that Appellant had shown by such expressions and conduct an attachment to the principles of the Constitution and that he was well disposed to the good order and happiness of the United States. The testimony of the various students and Professors Cruse and Frankian fairly show Appellant bore the reputation at the College, at least from 1931 up to the time he left the College in 1940 of favoring an ideology which they variously characterized as "socialism", "Markism", "communism" and "collectivism". On the other hand at the hearing before the trial court the testimony by the Appellant and on his behalf failed to show that his mental convictions had changed to the extent that he opposed his earlier convictions and beliefs as expressed in 1934 or 1935. Appellant's proof was at best only of a negative character. The expressions of his beliefs in 1934 or 1935 clearly demonstrated strongly entrenched mental convictions. He had long since arrived at an age of maturity. Obviously such a mental attitude could not easily be changed. It was clearly, therefore, incumbent upon Appellant to carry the burden of satisfying the trial court that strong and substantial reasons had prompted his opposition to his earlier expressed beliefs.

Judicial authority hereinafter referred to does not support Appellant's contention to the effect that the trial court erred in considering the mental attitude or conduct of Appellant prior to the one-year residential period immediately preceding petitioning for naturalization (Br. 15, 17).

Sound public policy in the granting of naturalization is opposed to such a contention. For example, an alien legally in this Country could, merely by the simple expedient of marrying a citizen and desisting from a life of crime for the short period of less than two years, demand that the Court grant his petition for naturalization, and then resume his former criminal activities. Similarly, aliens holding beliefs opposed to the American way of life, could by forcing a favorable mental attitude, acquire naturalization within the same period of time, and then publicly espouse such contrary beliefs. Even if the Government could carry the heavy burden of establishing in a cancellation suit by "clear, unequivocal, and convincing evidence which does not leave the issue in doubt"[6] that such alien was not entitled to naturalization, the remedy of cancellation would be wholly inadequate, because such alien could quickly again acquire naturalization by the same method for the reason that his mental attitude back of the one-year period could not be inquired into. "That would indeed put a premium on the successful perpetration of frauds against the nation."[7]

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[6]Rule laid down in *Schneiderman v. United States*, 320 U. S. 118, 63 S. Ct. 1333, 88 L. Ed. 1796.

[7]Phrase borrowed from *Knauer v. United States*, 328 U. S. 654, 674, 66 S. Ct. 1304, 1315.

In the case of the petition for naturalization of the spouse of a citizen where the contention was made that "* * * since by Sec. 707(a) the period of 'good behavior' is made coextensive with the period of residence (to-wit, five years), by the same token, the period of 'good behavior' when naturalization is sought under Sec. 710(a), should be coextensive with the period of residence, to-wit, one year" the Court concludes that in its opinion "neither reason nor authority supports such a contention. If there is any doubt at all as to whether petitioner can satisfy the statutory prerequisites, the issue must be decided against him, inasmuch as he has the burden of proof. * * * Congress clearly did not intend that the circumstance of marriage by an alien to an American citizen spouse should relieve a petitioner from substantial requirements of 'good behavior' prescribed for all other aliens. * * * It is unthinkable that we should restrict our inquiry as to this vital matter, because the period of residence is shortened, when application is made under Sec. 310(a) of the Nationality Act. * * * The statute in no way imposes any limitation upon judicial inquiry as to the petitioner's character. All that the statute does is to make ineligible for citizenship those who cannot show good moral character for at least five years prior to the application for citizenship. It follows, therefore, that whether the petitioner has the burden of showing five or one year's good behavior, the inquiry of the Court on the subject matter is not statutorily circumscribed."[8]

Where an alien was convicted of first degree murder in 1913; pardoned in 1932, and petitioned for citizenship in

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[8]*In re Laws,* 50 F. S. 179.

1940, the trial court went back of the five year period into the circumstances surrounding the conduct of the alien in 1913 giving rise to the murder charge, in determining his fitness for citizenship.[9]

In determining attachment to the principles of the Constitution where the alien-petitioner for naturalization had been guilty of violating the National Prohibition Act, the Eighth Circuit Court of Appeals held in a cancellation suit that it was proper to consider violations occurring from 1½ to 2½ years after naturalization.[10] Such conduct was clearly outside the statutory residential period.

The trial court in determining fitness of an alien for citizenship in 1945, took into consideration his conviction on a narcotic charge in 1914 when the alien was a mature adult.[11]

In a suit to set aside a certificate of naturalization wherein the contention was made that moral delinquency prior to the five year period was immaterial, the Court reasons that such a contention overlooks the fact that an order admitting an alien to naturalization is not made as a matter of course, but is an act of grace, and that before he can be admitted to citizenship, "it must be made to appear to the satisfaction of the court" that such alien has disclosed the facts bearing on his moral conduct "during and before the five-year period, in order that the court may determine whether, taking into account

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[9]*In re Balestrieri*, 59 F. S. 181.

[10]*Turlej v. United States*, 8th Cir., 31 F. (2d) 696.

[11]*Petition of Gabin*, D. C., 60 F. S. 750.

his whole conduct, he has in fact been a man of good moral character during the five year period."[12]

Naturalization was denied in 1926 where the alien had been convicted in 1912 of manslaughter and paroled in 1915.[13]

In a cancellation suit where it was urged that conduct outside the five-year period should not be considered the Court concluded "* * * that the five-year period * * * is not a statute of repose, insofar as to preclude a court from going beyond it, in order to ascertain the behavior and antecedent conduct of the petitioner, for the purpose of so far judging the future by the past as to form a conclusion whether benefit or harm would accrue from such petitioner's admission as a citizen. To take any other view of the law would be tantamount to saying that which all the decisions hold cannot be said, namely, that one applying for citizenship does so as a matter of right, and not as an humble petitioner for an act of grace. As I read the statutes, they vest discretion in the trial courts * * * and I cannot read the statute in such wise as to construe it to mean that the greatest criminal who ever left his native country unhung may come to this country, and after five years of impeccable conduct demand, and on his demand compel, the acceptance of himself as a citizen by this country."[14]

An alien who pleaded guilty to a charge of murder in the second degree was denied citizenship, although before

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[12]*United States v. Etheridge,* D. C., 41 F. (2d) 762.

[13]*In re Caroni,* D. C., 13 F. (2d) 954.

[14]*United States v. Kichin,* D. C., 276 Fed. 818, 822. There is no vested right in an alien to the privilege of naturalization. See *Luria v. U. S.,* 231 U. S. 23, 34 S. Ct. 10, 58 L. Ed. 101.

the offense and for more than five years after the expiration of the imprisonment his conduct revealed no cause for censure.[15]

In determining whether the alien spouse of a citizen carried the burden of establishing attachment and that he had ceased to believe in revoluntionary principles as enunciated in his book "I Knew Hitler", the trial court concluded it was not restricted to the three-year period, but that "* * * the Court may require that this petitioner prove good moral character and attachment to the principles of the Constitution of the United States for at least five years, and for a longer period if deemed necessary."[16]

In considering the alien's motion to strike from an order denying citizenship the language "with prejudice for a period of five years" in the case of a petition filed by the alien spouse of a citizen, the trial court concluded it was not restricted to the one-year period, stating that "* * * the Court can require proof for at least five years and for a longer period if deemed proper. * * * The test is not the length of time an alien has resided in the United States without being convicted of a crime, but whether the moral character and mental attitude of the individual entitle him to citizenship, * * * and the government may inquire into his entire life history to ascertain his true character and inclinations."[17]

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[15]*In re Ross* (C. C.), 188 Fed. 685.

[16]*Petition of Ludecke*, D. C., 31 F. S. 521, 523.

[17]*In re Taran*, D. C., 52 F. S. 535, 539.

In an appeal from a suit cancelling citizenship granted in 1904 this Honorable Court held that the lower court was justified in considering the declarations and expressions during the years 1916 and 1917 in determining the attitude of the alien when he applied for naturalization, stating that "One who spoke in that way * * * must have taken the oath * * * with a reserved determination, to be kept down, but nurtured, until a momentous time might come. In years, however, the time did come, and the criterion of original fraud must be the later conduct, which, in its relation to the earlier attitude, will furnish safe ground for judgment."[18]

For a period of ten or twelve years prior to 1931 an alien petitioner for naturalization testified that he had paid officers for protection in connection with his liquor operations. He was convicted a number of times for liquor violations and served an aggregate sentence of three years. He was finally released from imprisonment in 1931. Just prior to his release he had expressed the conviction that all public officers were corruptible and purchasable. No evidence of misconduct was shown from 1931 up to the time of his final hearing before the trial court in 1938 on his petition for naturalization. The contention was raised that inquiries concerning his conduct back of the five-year period were improper. The trial court disagreed with this contention. In addition to considering the criminal record of the alien, the trial court made the

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[18]*Schurmann v. United States,* 9th Cir., 264 Fed. 917, 920.

following comment with respect to the alien's expressed belief in the corruptibility of public officials. *"There is no evidence that the attitude of mind as thus expressed by the applicant has undergone a change."* (Emphasis ours.) Further, "The domestic enemy is more dangerous than the foreign enemy for the reason that history is replete with the record of governmental disintegration and decay arising solely from corruption within, which means the inroads of domestic enemies upon the basic foundations of the government."[19]

One Court expressed the view that the entire life history of the candidate for naturalization may be inquired into under the authority of the Government to cross-examine specified in the naturalization statutes.[20]

A Question of Fact Presented.

The question of whether an alien seeking naturalization is attached to the principles of the Constitution and is well disposed to the good order and happiness of the United States is one of fact.

> "In specifically requiring that the court shall be satisfied that the applicant, during his residence in the United States, has behaved as a man of good moral character, attached to the principles of the Constitution of the United States, etc., it is obvious that Congress regarded the *fact* of good character and the

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[19]*In re De Mayo*, D. C., 26 F. S. 996, 999.

[20]*In re Kornstein*, 268 Fed. 172, 173. The authority herein referred to is now found in Sec. 334(d), Nationality Act of 1940 (54 Stat. 1157; 8 U. S. C. 734(d)).

> *fact* of attachment to the principles of the Constitution as matters of the first importance. The applicant's behavior is significant to the extent that it tends to establish or negative these facts." (Emphasis by the Court.)[21]

In determining these facts, "a wide, judicial discretion is lodged in the judge who hears a petition for naturalization,"[22] and the ultimate finding of the trial court will not be rejected on appeal "except for good and persuasive reasons,"[23] for, as has been said, "the proceeding is of such a character that its decision must rest largely with the trial court; if he does not exercise an unreasonable discretion, his decision must stand."[24]

It is submitted that the trial court exercise no "unreasonable discretion" in denying the instant petition. Upon a "fair consideration of the evidence adduced" before the trial court "doubt" would inevitably be raised "in the mind of the court" as to whether Appellant from his behavior and declarations of his beliefs as advocated by him in about 1935, his reputation at the college from 1931 to 1940, weighed against testimony on his behalf at the final hearing which viewed in its most favorable light was at best only negative, was a person who in good faith is attached to the principles of the Constitution and well disposed to the good order and happiness of the United States.

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[21]*United States v. Macintosh,* 283 U. S. 605, 616, 51 S. Ct. 570, 572, 75 L. Ed. 1302.

[22]*Tutun v. United States,* 12 F. (2d) 763.

[23]Same as 21, *supra,* 283 U. S. 605, 627, 51 S. Ct. 570, 576.

[24]*In re Fordiani,* 120 Atl. 338, 342. See, also, *Allan v. United States,* 9th Cir., 115 F. (2d) 804.

POINT II.

The Trial Court Was Correct in Its Interpretation of the Principles of the Constitution and in Concluding That Appellant's Views Were Contrary to Such Principles, Within the Meaning of the Naturalization Laws.

THE TEST LAID DOWN BY THE SCHNEIDERMAN DECISION[25] IS NOT APPLICABLE TO THE INSTANT PROCEEDING.

Appellant's contention (Br. 16, 25), that in determining whether the views of the Appellant are opposed to the principles of the Constitution, the test laid down by the *Schneiderman* decision is controlling, is ruled out by the clear and unmistakable language of the decision itself (320 U. S., p. 120):

> *"This is not a naturalization proceeding in which the Government is being asked to confer the privilege of citizenship upon an applicant.* Instead the Government seeks to turn the clock back twelve years after full citizenship was conferred upon petitioner by a judicial decree, and to deprive him of the priceless benefits that derive from that status. * * * This does not mean that once granted to an alien, citizenship cannot be revoked or cancelled on legal grounds under appropriate proof. But such a right once conferred should not be taken away without the clearest sort of justification and proof. *So, whatever may be the rule in a naturalization proceeding* (see *United States v. Manzi,* 276 U. S. 463, 467, 48 S. Ct. 328, 329, 72 L. Ed. 654), in an action instituted under

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[25] *Schneiderman v. United States,* 320 U. S. 118, 63 S. Ct. 1333, 88 L. Ed. 1796.

> Sec. 15 for the purpose of depriving one of the precious right of citizenship previously conferred we believe the fact and the law should be construed as far as is reasonably possible in favor of the citizen." (Emphasis ours.)

In the *Schneiderman* cancellation proceedings the Supreme Court concluded:

> "That the Government has not carried its burden of proving by 'clear, unequivocal, and convincing' evidence which does not leave 'the issue in doubt' that petitioner obtained his citizenship illegally."[26]

The Government, of course, has no such burden in the instant naturalization proceeding.

The *Schneiderman* case concerned a United States citizen. The instant proceeding concerns the grant of a privilege being sought by an alien.

In the *Schneiderman* case there was no evidence of utterances made by Schneiderman prior to or at the time of his naturalization showing a lack of attachment to the principles of the Constitution. In the instant proceeding there was evidence before the trial court of Appellant's beliefs and behavior in 1934 or 1935 and reputation at the College from 1931 to 1940, and no affirmative evidence was produced before the trial court showing that Appellant opposed his earlier mental convictions. (See discussion *infra* under the headnote "Evidence and Testimony.")

The *Schneiderman* decision in using the language "So, whatever may be the rule in a naturalization proceeding"

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[26]Same at note 25 at 158 U. S. 320, at 1352, S. Ct. 63.

refers to a prior decision of the Supreme Court which sets forth the test or the rule in a naturalization proceeding where an alien is seeking a grant of citizenship, as follows:

> *"Citizenship is a high privilege, and when doubt exists concerning a grant of it, generally at least, they should be resolved in favor of the United States and against the claimant."*[27] (Emphasis ours.)

The rule here stated requires that the alien seeking naturalization satisfy the trial court that he is worthy of the high privilege of citizenship. Certainly then, the expression of mental convictions and beliefs are measured by an entirely different test when the candidate is seeking the high privilege of citizenship, than in a suit brought to take away the status of "citizen."

That the test here must be evidence which satisfies the trial court is clearly stated by the Supreme Court:

> "The applicant for citizenship, like other suitors who institute proceedings in a court of justice to secure the determination of an asserted right, must allege in his petition the fulfillment of all conditions upon the existence of which the alleged right is made dependent, *and must establish these allegations by competent evidence to the satisfaction of the court."*[28] (Emphasis ours.)

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[27]*United States v. Manzi*, 276 U. S. 463, 467, 48 S. Ct. 328, 329, 72 L. Ed. 654.

[28]*Tutun v. United States*, 270 U. S. 568, 578, 46 S. Ct. 425, 427, 70 L. Ed. 738.

Benefit to the Nation the Ultimate Criterion.

The ultimate criterion in granting naturalization to aliens is benefit to the Nation. Herein again there is a wide divergence between this test and that laid down in the *Schneiderman* decision. The test of benefit to the Nation has ample judicial support. The Supreme Court supports this latter view:

> "In other words, it was contemplated that his admission should be mutually beneficial to the government and himself, the proof in respect of his established residence, moral character, and attachment to the principles of the Constitution being exacted because of what they promised for the future, rather than for what they told of the past."[29]

Evidence and Testimony.

The decision of the trial court, which by stipulation became the findings of fact and conclusions of law [Tr. 403-4], contains a comprehensive discussion of the evidence [Tr. 385, 403]. The testimony of the seven witnesses testifying on behalf of the Government relative to Appellant's beliefs and teachings in economics and government is here briefly summarized as follows:

Burbank Lewis testified in effect that Appellant stated he was going to teach Marxism at City College [Tr. 5].

Catherine Mantalica testified that he ridiculed religion and made "some slurring remark in reference to the Pope" in an economics course [Tr. 12].

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[29]*Luria v. United States,* 231 U. S. 9, 23, 34 S. Ct. 10, 13, 58 L. Ed. 101. See, also, *In re Sigelman,* 268 Fed. 217 (D. C. Mo.), and *In re Caroni,* 13 F. (2d) 954 (D. C. Cal.)

Roy F. Spaulding, Jr., testified that Appellant made comparisons always unfavorable to capitalism and favorable to socialistic doctrines, communistic doctrines and doctrines of that type of economic theory [Tr. 30, 31]. He further testified that Appellant taught that capitalism was just about dead and people were getting smarter all the time and would turn to socialism and that he made slandering remarks in a sly manner against God [Tr. 32].

Belford M. Cruse, a Professor in the same college, testified that he had discussed politics with the Appellant and "As a general principle I felt that Mr. Wixman rather favored the ideology of Communism." He based this impression upon "the general opinion you get from discussing the subject with any individual" [Tr. 38].

Sooren Franklin, another Professor in the same college, testified that students at the college complained that they had heard lectures on Communism [Tr. 82]; that such complaints extended from 1931 to 1940 [Tr. 86]. The students further sensed "that he was advocating or preaching that particular type, and finding good points about it in contrast with our own" [Tr. 91].

P. A. Horton, an investigator, testified that he attended a meeting at which a Hindu who spoke on the general theory of Soviet Communism was introduced to the chairman of the meeting by Appellant [Tr. 98, 102, 103]. He also heard a group singing the Communist Internationale at the Appellant's home [Tr. 100].

The foregoing is direct evidence of Appellant's political beliefs and the reputation he bore at the college. The testimony of these witnesses finds corroboration in Appellant's written declarations as shown in his lecture,

"Economic Trends" [Tr. 235; Ex. 1, R. 5-25]. These witnesses were convinced that Appellant was doing more than merely teaching the "Marxist," "Communist," and "Socialist" theories. This belief also finds corroboration in Appellant's lecture "Economic Trends." Appellant's lecture "Economic Trends" [Tr. 235, Ex. 1] was written and delivered before a group of students and other persons at City College, about 1935 [Tr. 241].

At the outset of this lecture Appellant admitted that some might consider his thoughts and principles as unpatriotic. He protested his loyalty to "this country" but continued, "However, the country I have in mind may perhaps be to a degree different from that to which some have been accustomed" [Tr. 389]. He continues that he is about to offer an examination of trends of thought in present day economic life [Tr. 390]. He then analyzes the Capitalistic system and finds that it is not satisfactory; that too few have too much and too few have not enough. He concludes that Capitalism has the seeds of its own destruction, "Capitalism, then, under those circumstances fails to provide the essentials for the system which it hopes will keep it alive" [Tr. 392, 393, 394, 395, 396]. He then proceeds to discuss "state capitalism" as an economic system. "With state capitalism out of the picture, what then is to take its place" [Tr. 397]? After a discussion of Facism he begins his examination and definition of "the collectivist state." "The collectivist state," he wrote, "according to its proponents, in brief, proposes that, 'all resources, all land and buildings, all manufacturing establishments, mines, railroads and other means of transportation and communication, should be, not private property but the common property of all those who work.'

It further proposes that society should consist only of those who work, which means that all members of society should be socially useful human beings . . . that production be made to serve the needs of those who work, rather than to serve the needs of a few parasites . . . that production of goods be planned scientifically to avoid anything resembling the crises of capitalist society, that the society established be intent on developing the machine technique, mass production, and a minute division of labor to the fullest possible extent . . .' " [Tr. 397, 398].

He states the collectivist believes that this state of practical idealism will be reached through four states of development [Tr. 398].

> "First of all, there must be the stage of bourgeois capitalism, which 'is characterized by private property, free enterprise and competition. This state of being, because of its inner defects and contradictions, must give way to another, 'The change to be expedited and effect by the strong, determined, class-conscious part of the working class—all workers or producers, or those laboring by brain or brawn—when a favorable opportunity presents itself' " [Tr. 235, 251].

Is Appellant using the words of an alien who believes in the orderly change provided by our present Constitutional system of amendment when he employed the phrase above quoted "when a favorable opportunity presents itself"?

Further, he stated that the change from the present system of "bourgeois capitalism, private property, free enterprise and competition" is to be "expedited" by the "strong," "determined," "class-conscious part of the

working class." Can this language reasonably be construed when considering an alien seeking the high privilege of citizenship, an advocacy that his ideal "collectivist state" is to be arrived at by peaceful changes under our present system of government by way of Constitutional amendment?

The terms he employs in describing "collectivism" leaves no doubt that it is his ideal. For he states it is "man's ultimate goal," "the panacea for which he has been striving for untold ages," "his El Dorado," "his promised land—his ideal which he is to reach here on this earth now, and not 'by and by when you die'" [Tr. 389, 399, 400].

A look at the second stage in arriving at the ultimate goal of "collectivism" advocated by Appellant *precludes any contention that Appellant believes that his ideal of a "collectivist state" is to be arrived at by Constitutional amendment.* In this second stage he is willing to discard the present system of free enterprise and *submit to the rule of the "iron hand" of an "intelligent minority" until all people are educated to the "ideals" of the "collectivist state."* This is clearly shown by the following quotation from his lecture:

> "This achieved, there is to follow the second stage—'The dictatorship of the masses.' Realizing that since not all the workers are capable in managing government in industry, there must be an intelligent minority to pave the way by holding power and ruling with an iron hand till socialism is brought into being and all people are educated to its ideals" [Tr. 235, 251].
>
> "The second stage is to give way to the socialist society—the third phase of collectivism. During this,

'All means of production will be in the hands of the democratically governed state. The masses of workers will now be in control. Wages will still be paid on the basis of efficiency or productivity, with some prevailing differences in wages as a result.' Since there will still be considerable centralization of economic or political control, unless all vestiges of class opposition have been eliminated, this third stage is very much akin to state socialism" [Tr. 235, 252].

"The last and final phase of this societal change will be the collectivist society—the ultimate goal. This time, coercive authority will have disappeared, everyone voluntarily participating in co-operative commonwealth. This will be the real 'Classless' society, with no wage system, no price, no money—a system based upon the principle of 'from each according to his ability, to each according to his need.' Thus, cryptly put, will evolve the state known as collectivism, a state which according to the prophetic, far-seeing vision of Karl Marx, is historically the logical outcome of a system of society that has outlived its usefulness, its mission, its place in history of economic growth of mankind. It is man's ultimate goal. It is the panacea for which he has been striving for untold ages. It is his El Dorado, his Promised Land—his ideal which he is to reach here on this earth now, and not 'by and by when you die' " [Tr. pp. 398, 399, 400].

Then he continues:

"In conclusion may I say that the choice we are asked to make lies before us. If an economic system is to be judged on the basis of a worth-while standard of living for every man, woman and child under it, then we must choose accordingly. On that basis I cannot see any hope for economic planning in Italy,

> Germany, Japan and other such Fascist countries. Nor do I see too much hope for this same economic planning in England, the United States, France and other democratic and pseudo-democratic states. Why? In all these instances unrestrained capitalism is in the saddle, and economic planning for all is wholly inconsistent with, and impossible under, unchecked capitalism. On the other hand, this study and reflection could lead one to conclude that progress, human well being—civilization in brief, definitely and decidedly has little to fear, nay, it has much to expect, from a system of genuine socialization" [Tr. 400, 401].

That the foregoing quotation from the lecture represented the views of Appellant is undeniably shown by further quotation from the same lecture:

> "If I am permitted to paraphrase Lincoln's answer, I would say that, if some ideas I shall bring out are somewhat unconventional, unorthodox by far, I, too, do not mind them, for I am squarely behind them. I do hope you out there in front they will not jar" [Tr. 388].

There can be no doubt that Appellant was expressing his own mental convictions and beliefs and that he held an active rather than a passive adherence to such beliefs, so much so that he was willing to risk criticism and position for the opportunity of letting the students know that he for one believed in "collectivism" [Tr. 240, 388]. He described the "state known as collectivism" [Tr. 400] as "man's ultimate goal. It is the panacea for which he has been striving for untold ages. It is his El Dorado, his Promised Land—his ideal which he is to reach here on this

earth now, and not 'by and by when you die'" [Tr. 400]. These are very glowing terms. They are terms used in the sense of advocacy and not by way of explanation. He believes this state of collectivism may be realized because "according to the prophetic, far-seeing vision of Karl Marx, is historically the logical outcome of a system of society that has outlived its usefulness, its mission, its place in history of economic growth of mankind" [Tr. 400]. His reference to Karl Marx as possessing a "prophetic, far-seeing vision" are terms indicating the depth of Appellant's convictions and favorable belief in the views of Karl Marx. They are not terms merely explaining a prophesy by Karl Marx.

When testifying before the trial court, at no time did Appellant indicate that he was opposed to the views and beliefs he had expressed in his lecture. An example of his testimony in this respect is shown in connection with questions relating to that part of his lecture dealing with the "inescapable capitalist tendency to generate renewed depression" in answering the question "Does it express your opinion?" in the following words, "On the basis of conditions at that time. At the present time I could say with modification, that it can be changed, that it can be revived; that it has been shown it could be revived during the war period." Question, "Is it your belief that this is a permanent revival of Capitalism?" Answer, "I could not look into the future" [Tr. 242].

Conclusion.

Appellee respectfully submits that the trial court was justified in concluding that Appellant at the time of delivering the lecture heretofore discussed was not attached to the principles of the Constitution nor well-disposed to the good order and happiness of the United States. In the words of the trial Judge in discussing certain phases of this lecture:

> "Up to that time he has not uttered one word of hope or of optimism. He has held out the picture of gloom, of destruction and disaster; that it makes little difference how the processes under the Constitution shall be invoked or employed, it is a case of utter disaster. Is that the sort of a picture that should be presented by a teacher of the youth of America during a time of travail and distress? Shouldn't there be some note of hope, of optimism, of encouragement, of steadfast adherence to the processes under which we live and under which a country has been built,—under which it was living at that time and endeavoring to work out, and did work out? It seems to me there cannot be any answer to that excepting that one who holds up that sort of a picture cannot be said to be well disposed towards the good order and happiness of the American people." [Tr. 396.]

And again [Tr. 401]:

> "If anyone can find any cause for joy, or happiness, or peace and contentment, for good order to any people, in that lecture, I cannot see it."

The burden of proof was upon appellant. It was well within the wide discretion lodged within the trial court to find that Appellant had failed to overcome the doubt in

the mind of the Court that Appellant was in fact attached to the principles of the Constitution and to convice the Court that petitioner had changed his previous attitude.

The Court's decision does not constitute a limitation of academic freedom. Again in the words of the trial court [Tr. 403]:

> "The instructor should be a stimulating instructor, as one of the witnesses stated, but he should stimulate adherence to the American principle of life and not to some foreign ideology that is entirely alien to the makeup of the United States."

From the foregoing, we submit that Appellant has failed to meet the burden imposed upon him by our laws in such fashion as to permit him to be admitted to the high privilege of citizenship in the United States.

Respectfully submitted,

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No. 11599

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

SAMUEL MORRIS WIXMAN, also known as SHULIM WIXMAN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF FOR APPELLANT.

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REPLY BRIEF FOR APPELLANT.

At the outset we believe it should be clearly stated what is, and what is not, involved in the appeal at bar. There is no question in this case of affiliation with the Communist or any similar political party or group; there is no finding, charge, evidence, or indication to this effect. The question in this case arises from the unquestioned fact that appellant was what is known as a "liberal" or "progressive"; he was idealistic and social-minded, and a person who believed in attempting to improve the living conditions of the community as a whole. The District Court found that appellant's views included a belief in economic collectivism and a disbelief in the future of capitalism and that such belief was inconsistent with "the principles of the Constitution" within the meaning of the naturalization law; and the question before this Court

is whether the District Court erred in this finding and in this conclusion.

But for this question no doubt has or can be raised as to appellant's attachment and his eligibility for citizenship. He has lived in the United States without interruption since childhood and, partly because he has not taken his adopted country for granted, believes ardently in the future of the United States and the freedom and opportunity he has found in this country. He enlisted in the United States Army in World War I[1] and engaged in civilian defense work and other community activities during World War II; he is devoted to his home and family, is of a religious nature, a respected and responsible member of the community, and married to a native-born American citizen of similar standing. (See Appellant's Main Brief for record references in support of the above statements as to appellant's character, pp. 4-6.)

Reply to Appellee's Point I.

Appellant has at all times recognized that evidence of his activities prior to the one-year statutory period is proper matter for consideration in determining the beliefs he held during such period, and it is not therefore necessary or relevant to consider appellee's protracted argument to establish this uncontested point. Appellant's position as to the evidence and the validity of the findings of fact, which is stated in Point I of our main brief, is

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[1]Contrast opinions referring to reluctance to serve in the armed forces as evidence of lack of attachment: *Hauge v. United States,* 276 Fed. 111 (C. C. A. 9th, 1921); *In re Aldecoa,* 22 F. Supp. 659 (D. Id., 1938); *In re Linder,* 292 Fed. 1001 (D. C., S. D. Calif., S. D., 1923); *In re Shanin,* 278 Fed. 739 (D. Mass., 1922); *In re Tomarchio,* 269 Fed. 400 (D. Mo., 1920).

briefly as follows: (1) the evidence on which the District Judge relied to support his finding that appellant believed the capitalist ownership of industry must be supplanted by collectivism, and the only evidence bearing on this finding, was the speech appellant made in 1934-1935 and the testimony of several former students and fellow-teachers at the college; (2) such testimony was so insubstantial and contradictory in so far as it relates to this finding that it affords no support for the finding;[2] (3) the finding is, therefore, only supported by the 1934-35 speech; (4) the probative force of the speech is necessarily affected by the length of time between its delivery and the one-year statutory period for which the District Judge was determining appellant's belief; (5) thus, the inference that appellant possessed during that period the beliefs represented by the speech is weakened by the fact that approximately ten years elapsed between the speech and the period in question; (6) in view of this weakness, together with other factors making the asserted change of appellant's beliefs likely and credible,[3] the testimony in appellant's favor[4] is fully and clearly sufficient to overcome the inference that he possessed during the later period the beliefs represented by the speech.

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[2]The District Court cannot base its findings on incredible and self-contradictory evidence against the petitioner. See *Petition of Kohl,* 146 F. (2d) 347, 348 (C. C. A. 2, 1945), in which the judgment denying citizenship was reversed and the District Court was directed to grant the petition.

[3]See Main Brief, pp. 23-24.

[4]Appellee's characterization of all the testimony in appellant's favor as negative (Brief, p. 14) is inaccurate. We assume this term could be applied to testimony that the witness does not know whether or not the subject possessed the beliefs in question; while some of appellant's witnesses were not acquainted with his economic and social views, others gave positive testimony as to his social views during the period in question (See Main Brief, p. 24).

It seems indisputable that due weight must be given to the period of time elapsing between the conduct on which the lower court relies and the period for which the beliefs are in issue; and courts of appeal have had occasion in several instances to consider this time factor in reversing, for insufficient supporting evidence, judgments denying citizenship.[5] The possibility of change of views with the passage of time is, indeed, almost a postulate of the naturalization law and procedure, as is most vividly illustrated by those decisions dealing with the filing of a new petition after a denial of citizenship,[6] as well as by a recent Circuit Court decision affirming the grant of citizenship to an alien on the basis of his conduct during the required pre-petition period though he had been found some years before, in a deportation proceeding, to be deportable as a member of an organization advocating overthrow of the government by force and violence.[7]

The weight to be accorded to the passage of time in determining whether a state of affairs once shown to exist continues to do so has been recently emphasized by the United States Supreme Court in a bankruptcy case in which this presumption of continuance was crucial. *Maggio v. Zeitz,* No. 38, October Term 1947, decided Feb. 9, 1948. There the Court said:

> "Under some circumstances it may be permissible, in resolving the unknown from the known, to reach

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[5]*In re Bogunovic,* 18 Cal. (2d) 160, 114 P. (2d) 581 (1941); *Petition of Zele,* 140 F. (2d) 773 (C. C. A. 2, 1944).

[6]*Repouille v. United States,* 165 F. (2d) 152 (C. C. A. 2, 1947); *In re Bevelacqua,* 295 Fed. 862 (D. Mass., 1924); *Petition of Escher,* 279 Fed. 792 (D. Tex., 1922).

[7]*United States v. Waskowski,* 158 F. (2d) 962 (C. C. A. 7, 1947).

> the conclusion of present control from proof of previous possession. Such a process, sometimes characterized as a 'presumption of fact', is, however, nothing more than a process of reasoning from one fact to another, an argument which infers a fact otherwise doubtful from a fact which is proved . . . the inference from yesterday's possession is one thing, that permissible from possession 20 months ago quite another."

And in a footnote summing up the position of the Circuit Courts other than that whose decision was under review, the Court said:

> "Other circuits have treated the presumption of continued possession as one which 'grows weaker as time passes, until it finally ceases to exist' . . . and which loses its force and effect as time intervenes . . ."

The Supreme Court's language is no less applicable to a presumption concerning the continued possession of beliefs than the continued possession of property.

Reply to Appellee's Point II.

We respectfully submit that appellee's Point II wholly fails to meet the issues of the case at bar. Instead of discussing the proper interpretation of the statutory requirement of "attachment to the principles of the Constitution", appellee deals with this important question of law as if a petition for naturalization is to be granted or denied on the basis of the District Judge's individual view as to the soundness of the petitioner's beliefs. It would seem apparent that this requirement, more than any

other, is to be construed in the light of established legal criteria rather than emotional reactions.[8]

Further, appellee not only seems to ignore the fact that the Court's function is to interpret and apply the requirements for naturalization established by Congress, but also to disregard the fact that there is an established procedure for adjudication of petitions and appeals therefrom. For appellee makes little, if any, attempt to support the District Judge's findings of fact or to demonstrate that on these findings his conclusion of lack of attachment to the principles of the Constitution is valid; instead, the appellee relies on vague characterizations of appellant's reputation, and searches the transcript for assertedly prejudicial items even though they have no relation whatsoever to the District Court's findings or conclusion.[9] The un-

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[8]Compare treatment of the requirement of a "good moral character" in *Repouille v. United States,* 165 F. (2d) 152 (C. C. A. 2, 1947) in which the Court pointed out that the standard for such character was the prevalent moral feeling in the community. Even here, however, the test is an objective one, rather than dependent on the personal predilections of the District Judge.

[9]Lewis, who is quoted by appellee as testifying that appellant stated he was going to teach Marxism at City College (App. Brief, p. 18), testified that this statement was part of a public speech, rather than a covert conversation, and could not recall any of the context, but merely that appellant "used the word" (Marxism) [Tr. 7]. Marxism was, of course, in the curriculum taught by appellant as well as by the other economics professors [Tr. 42]. Mantalica (quoted App. Brief, p. 18) could not recall the "slurring remark in reference to the Pope" which she claimed appellant made [Tr. 12] and such a remark, even if made, of course has no bearing on the District Court's findings. The value of the opinions of Spaulding (App. Brief, p. 19) as to appellant's teaching must be judged by the example he offered to illustrate his generalization that appellant was favorable to socialism [see Tr. 34-35, quoted on p. 7 of our Main Brief]. And Spauding's testimony that appellant made slandering remarks against God (App. Brief, p. 19), which is, to say the least, a meaningless piece of testimony, was properly excluded by the District Judge; was incredible in view of appel-

precedented and fallacious character of appellee's approach is highlighted by the uniform tenor of the decisions from all corners of the field of naturalization law: those pointing out that the petitioner for citizenship must meet the requirements established by Congress;[10] those giving careful consideration to the statutory intent with respect to the various requirement;[11] those emphasizing that the courts cannot add to these requirements;[12] and those stressing the doctrine that the naturalization hearing and proceeding are judicial,[13] a concept which implies above all else the use of established standards and procedure. For a denial of citizenship, particularly to one who, like appellant, is a long-time resident with no home or ties other than in the United States, and who in fact for years considered himself a citizen, is a grave and serious

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lant's religious nature (see Main Brief, p. 6); and has in any event no bearing on the findings. The testimony of Professors Cruse and Frankian (App. Brief, p. 19) is dealt with at pages 17 to 21 of our Main Brief and that of Mr. Horton (App. Brief, p. 19) upon whom the District Judge placed no reliance, does not seem worthy of comment.

[10]*In re Warkentin,* 93 F. (2d) 42 (C. C. A. 7, 1937), cert. den. 304 U. S. 563; *Estrin v. United States,* 80 F. (2d) 105 (C. C. A. 2, 1935); *United States v. DeFrancis,* 50 F. (2d) 497 (C. A. D. C., 1931); *United States v. Morelli,* 55 F. Supp. 181 (D. Cal., 1943); *In re Ringnalda,* 48 F. Supp. 975 (D. Cal., 1943); *In re Taran,* 52 F. Supp. 535 (D. Minn., 1943); *United States v. Ritzen,* 50 F. Supp. 301 (D. Tex., 1943).

[11]*Girouard v. United States,* 328 U. S. 61; *Schneiderman v. United States,* 320 U. S. 118; *Schwartz v. United States,* 121 F. (2d) 225 (C. C. A. 9, 1941); *United States v. Rockteschell,* 208 Fed. 530 (C. C. A. 9, 1913).

[12]*Petition of Kohl,* cited *supra,* note 2, at p. 349; *Tutun v. United States,* 12 F. (2d) 763, 764 (C. C. A. 1, 1926); *Schwab v. Coleman,* 145 F. (2d) 672 (C. C. A. 4, 1944).

[13]*United States v. MacIntosh,* 283 U. S. 605, 615; *Petition of Garcia,* 65 F. Supp. 143 (D. Pa., 1946); *In re Oppenheimer,* 61 F. Supp. 403 (D. Or., 1945); *Application of Levis,* 46 F. Supp. 527 (D. Md., 1942).

matter; not only does it involve a refusal of the various prerequisites of citizenship, but it also denies the petitioner the security which a citizen possesses against the possibility of that extremely "drastic measure" of deportation.[14]

The Schneiderman Decision and "the Principles of the Constitution".

While alleging that the *Schneiderman* decision is no authority on the meaning of "the principles of the Constitution" for the purposes of the case at bar, appellee offers no authority to bolster its assertion that appellant's beliefs are inconsistent with such principles, nor does appellee, as pointed out above, make any attempt to demonstrate that the District Court's findings reveal beliefs which have such an inconsistency.

All of appellee's factual statements about the *Schneiderman* decision are true, but none of them refute our assertion that that decision is controlling in a naturalization as well as in a denaturalization proceeding on the question of what are "the principles of the Constitution" to which the naturalization law requires attachment. We did not labor this point in our main brief because it seemed to us clear that the adjudication of "the principles of the Constitution" made for the purpose of determining whether Schneiderman should be denaturalized for lack of attachment thereto at the time of naturalization, would be applicable wherever the content of such principles within the meaning of the naturalization law, was in issue.

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[14] *Fong Haw Tan v. Phelan*, No. 370, Oct. Term, 1947 (decided by the United States Supreme Court, Feb. 2, 1948); *Delgadillo v. Carmichael*, 68 S. Ct. 10.

To clarify this point beyond argument, it is necessary only to refer to the Supreme Court's language with respect to the principles of the Constitution, which demonstrates that the Court was deciding what are the principles of the Constitution to which attachment is required for naturalization. It is these passages, which are apposite in the consideration of the questions of law in the case at bar rather than the Court's general language as to the differences between naturalization and denaturalization and the differences in the burden of proof in such proceedings, which we freely concede.

Thus, the Court said, in introducing its discussion of "the principles of the Constitution":

> "When petitioner was naturalized in 1927, . . . it was to 'be made to appear to the satisfaction of the court' of naturalization that immediately preceding the application, the applicant 'has (been) . . . attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the same'. Whether petitioner satisfied this . . . requirement is the crucial issue in this case. To apply the statutory requirement of attachment correctly to the proof adduced, it is necessary to ascertain its meaning." (320 U. S. at pp. 132-133.)

In then determining the meaning of the requirement, the Court, after discussing whether the statute created a test of behavior or a test of belief, felt constrained to adopt the latter test because in *United States v. Schwimmer*, 279 U. S. 644, and *United States v. MacIntosh*, 283 U. S. 605, both naturalization cases. "it was held that the statute created a test of belief" (320 U. S. at p. 135). This passage alone should make it indubitably clear that

the Court was considering the content of the attachment to the Constitution required by the naturalization law without distinction as to the type of proceeding in which the question arose. Then, in discussing what beliefs were to be deemed to show a lack of attachment to the principles of the Constitution, the Court used this language:

> "Our concern is with what Congress meant to be the area of allowable thought under the statute . . . it is not to be presumed that Congress intended to offer naturalization only to those whose political views coincided with those considered best by the founders . . ." (320 U. S. at p. 139.)

And the concluding statement, following the passage quoted in our main brief (page 30) as to the consistency of government ownership with the Constitution, is as follows:

"We conclude that lack of attachment to the Constitution is not shown on the basis of the changes which petitioner testified he desired in the Constitution" (emphasis supplied), a statement which makes it crystal clear that in the preceding discussion the Court was comparing the principles of the petitioner to the principles of the Constitution without regard to the type of proceeding before it.

Finally, the sentence at the close of the passage quoted on page 35 of our main brief, referring to the congressional intention underlying "the general test of 'attachment'" is to be noted.

In conclusion, on this aspect of the case, we do not dispute that insofar as the Supreme Court in the *Schneiderman* decision discussed the burden of proof in that case

and the proof against the petitioner therein, such discussion is not apposite to the case at bar; but we submit that it is incontrovertible that the Supreme Court's holding in the *Schneiderman* case as to the meaning of attachment to "the principles of the Constitution", *is* controlling herein.

We take no exception to the quotations from the *Manzi* and the *Tutun* cases (given on page 17 of appellee's brief) to the effect that doubts are to be resolved against the petitioner for naturalization and that the petitioner must establish that he fulfills the conditions for citizenship; but the issue here is: *what* are the conditions which he must fulfill. Those conditions do not, under the *Schneiderman* decision, include a belief in capitalist, as opposed to collectivist, ownership of industry,[15] and the District Judge's conclusion that because of the lack of this belief, appellant was not attached to the principles of the Constitution is therefore erroneous. The passage quoted in appellee's Conclusion (Brief p. 26) illustrates, we believe, the District Judge's concept that the principles of the Constitution require a complete faith in capitalism, a proposition which we believe is definitely refuted by the *Schneiderman* opinion.

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[15]Compare also the renowned statement of Justice Holmes dissenting, in *Lochner v. New York*, 198 U. S. 45, 75-76:

> ". . . The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics . . . a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of *laissez faire*. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States."

Appellee attempts to argue that appellant was not attached to the principles of the Constitution on the ground that he believed in undemocratic methods of political change. As pointed out in our main brief, the District Judge made no finding that appellant held such a belief. (Main Brief pp. 31-32.) And such a finding would in any event be unsupportable in view of the fact that the passages quoted by appellee (Appellee's Brief pp. 21-23) were not stated to be appellant's views but were merely the citation by appellant of the views of others; further, the time elapsing since the speech must be accorded weight as well as the affirmative credible, and uncontradicted testimony that appellant was a firm believer in democracy and freedom. (See Main Brief pp. 32-33.) We believe the appellant's complete candor about his beliefs, which makes his testimony about them almost impossible to disbelieve, is illustrated by his colloquy with the District Judge as to the future of capitalism (quoted in Appellee's Brief p. 25) in which appellant candidly told the Judge that he could not say with certainty whether or not the present revival of industry is permanent. In any event, even if it be assumed that there were support in the record for a finding of the sort appellee discusses, a finding of such a vital and derogatory nature cannot be inferred, nor can it be supplied by the appeal court.[16]

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[16]The only exception which might be permissible to the rule that the findings must be made by the trial judge is in the event that the evidence is entirely documentary and non-conflicting. See *United States v. Mitchell,* 104 F. (2d) 343 (C. C. A. 8th, 1939).

Conclusion.

The judgment of the Court below should be reversed, and that Court should be directed to grant appellant's petition for citizenship. For the finding on which the lower Court based its conclusion that appellant was not attached to the principles of the Constitution is clearly erroneous, and in any event its conclusion of law that the facts it found showed lack of such attachment is erroneous; further, the record shows that there is no basis other than the one erroneously taken by the District Court for a finding and conclusion of lack of attachment.

Respectfully submitted,

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No. 11599

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

SAMUEL MORRIS WIXMAN, also known as SHULIM WIXMAN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

PETITION FOR REHEARING.

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IN THE

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SAMUEL MORRIS WIXMAN, also known as SHULIM WIXMAN,

Appellant,

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Appellee.

PETITION FOR REHEARING.

Samuel Morris Wixman, appellant, respectfully requests rehearing in this cause. The ground for this petition is:

This Court gave no consideration to appellant's major argument for reversal of the District Court's judgment; namely, that the District Court's denial of appellant's petition for naturalization was based on an erroneous interpretation of the "principles of the Constitution" to which the naturalization statute requires attachment. Appellant believes that the question of the correctness of the District Court's interpretation was fully and adequately presented before this Court; that he has made a strong showing, meriting this Court's serious attention, as to the District Court's error; and that the judgment herein upholds a statutory interpretation, without this Court's consideration thereof, which is seriously detrimental to the proper and lawful administration of the naturalization law and which results in a grave miscarriage of justice to appellant.

ARGUMENT.

I.

The Question of the District Court's Error in Its Interpretation of the "Principles of the Constitution" Was Fully and Adequately Raised Before This Court.

(a) Repeated Emphasis on Question of Statutory Interpretation.

From the very inception, the question of the meaning of the "principles of the Constitution," as the phrase is used in the naturalization statute, has been of basic importance in this case. This question was argued both by counsel for appellant [Tr. pp. 320, 328-355, 372-376] and appellee [Tr. pp. 363-4] in the District Court; and its crucial nature was clearly recognized by the District Judge. He obviously deemed the evidence as to the nature of appellant's belief, and the meaning of "the principles of the Constitution" as two complementary parts of the issue of whether appellant was attached to such principles; and in order to compare the former with the latter, explicitly and implicitly throughout his opinion defines those principles [Tr. pp. 387, 388, 390, 392, 396, 401, 403].[1] Then, appellant's "Specification of Errors" in his Brief in this Court specified as error the District Court's conclusion "that the belief is 'collectivism' of industry which it found appellant to possess is inconsistent with the principles of the Constitution, and in its holding on the basis of such

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[1]Appellant wishes to express his respectful disagreement with this Court's observation (at footnote 4 of the opinion) that the District Court was not required, by Rule 52 of the Federal Rules of Civil Procedure, to "find the facts specially." For citizenship proceedings would seem to fall within the exception specified in Rule 81 (a) 2, since the naturalization statute does not specify any procedure with respect to rendering an opinion and the practice in citizenship cases prior to the Rules, "conformed to the practice in actions at law or suits in equity."

conclusion that appellant had not sustained the burden of proving attachment to such principles" (App. Br. p. 14); and in the opening of his Statement of Points to Be Argued, appellant emphasizes and underscores the major importance of the District Judge's error as to the meaning of "the principles of the Constitution" (App. Br. p. 15). Appellant's Brief next sets forth as Point II of its two points that "the Court erred in its interpretation of the principles of the Constitution of the United States, and it consequently erred in holding that appellant was not attached to such principles and was not well disposed to the good order and happiness of the United States, within the meaning of the naturalization law" (App. Br. pp. 16, 25). And the argument on this point is devoted to showing that the beliefs which the District Court found appellant to possess are consistent with constitutional principles under the Supreme Court's interpretation thereof, and that the District Court's conclusion as to the content of such principles was erroneous. In reply, appellee's Summary of Argument states as Point II of its two points that "The trial court was correct in its interpretation of the principles of the Constitution, and in concluding that appellant's views were contrary to such principles within the meaning of the naturalization laws" (App. Br. p. 3): and in its argument under this point (Br. pp. 15-25) appellee attempts to show the inapplicability of the Supreme Court decisions cited by appellant as to the meaning of the principles of the Constitution and to show the inconsistency of such principles with appellant's beliefs. Appellant again emphasized the District Court's error with respect to its interpretation of the principles of the Constitution in its reply brief, and the point was fully argued, both by appellant and appellee, without any objection from this Court or the appellee, at the oral argument.

(b) This Court's Failure to Consider the Question of Statutory Interpretation.

Despite the importance of this point of interpretation and the emphasis placed on it throughout by the District Court and both parties, this Court does not even advert to it in its opinion. And it is clear, in view of this Court's reasoning in upholding the District Court's judgment, that it only considered the other branch of this case: that is, the correctness of the District Court's determination as to the substance of appellant's beliefs. For this Court's reasoning, in upholding the District Court's judgment, with respect to the District Court's ability to pass on the credibility of witnesses and similar points, has no application to the District Court's interpretation of the "principles of the Constitution." It cannot be doubted that courts of appeal must pass *de novo* on such a question of law.

While this Court was not explicit as to its reasons for ignoring the question of statutory interpretation, there is some implication, by virtue of its emphasis on the Statement of Points on Appeal, that it did not deem this question to be covered thereby. We believe it is adequately covered by Point 3 reading, "The denial of the petition and the judgment thereon by the District Court is not supported by the evidence" [Tr. p. 32]. It is respectfully submitted that this point covers the argument that the principles of the Constitution are such that the evidence cannot be deemed to support the judgment of a lack of attachment to such principles, as well as the argument that the evidence itself is such that it cannot be deemed to support this judgment. For it is obviously impossible to determine whether or not evidence supports a judgment of a lack of attachment to the principles of the Constitution without determining what those principles are.

But even if the Points set forth in the Statement are not deemed to cover with sufficient clarity the point that the District Court erred in its interpretation of "principles of the Constitution," we respectfully submit that this omission in no way bars this Court's consideration of the argument. For it seems clear that the Rules of this Court are intended to give binding effect to the Statement of Points on Appeal, at the most, only in those cases where the appellant designates as the record on appeal merely parts of the record in the District Court. In the instant case the appellant designated the entire record before the District Court as the record on appeal [Tr. p. 28]; if in such a case the Statement of Points on Appeal should be filed at all, such Statement should not under the Rules of this Court, and cannot consistently with the Federal Rules of Civil Procedure as amended, preclude the appellant from raising an important point in his brief and argument. Particularly is this so where, as here, no prejudice whatsoever resulted to appellee from any deficiency in the Statement, and when there were, as will be shown below, ample reason excusing any inadequacy of the Statement of Points on Appeal.

(c) Federal Rules of Civil Procedure.

Rule 75 of the Federal Rules of Civil Procedure entitled, "Record on Appeal to a Circuit Court of Appeals," to which Rule 19 of the Rules of this Court must be deemed supplementary,[2] provides for designation of the record on appeal (Rule 75 (a)), filing of the transcript

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[2]Any law in conflict with the Federal Rules is of no force and effect. Act of June 19, 1934, c. 651, sec. 1, 48 Stat. 1064, 28 U. S. C. 723b.

(Rule 75 (b)), the form of testimony (Rule 75 (c)), and then provides:

> (d) Statement of Points. No assignment of errors is necessary. If the appellant does not designate for inclusion the complete record and all the proceedings and evidence in the action, he shall serve with his designation a concise statement of the points on which he intends to rely on the appeal (as amended by amendments adopted by Supreme Court of the United States, Dec. 27, 1946).

We respectfully submit that it is inconsistent with Rule 75 (d) to require the appellant to file the Statement of Points on Appeal when he designates the entire record. And the Rule was thus interpreted even before the 1947 amendment adding thereto the first sentence, "No assignment of errors is necessary." For as a noted commentator stated:

> "There is no reason for assignments of error being prepared for presentation to the appellate court prior to making up the record except as a basis for what is to be included in it. If the whole record is to be sent up there is no use for any assignment; but if the appellant designates only a part of the record he should specify the points he relies upon, so that the appellee may determine whether he wants some additional matter put in to protect him on the designated points. The assignments of error or points *are therefore to be employed under the new rules only when they are of some use.*" (Sunderland, *The New Federal Rules,* 45 W. Va. Law Quarterly 5, 1938.) (Italics added.)

Since the 1947 amendment with respect to assignments of error, it seems even clearer that the Rule intends that

the Statement of Points should *not* be required when the entire record is designated. For the purpose of the Rules is to make procedure simple and expeditious, and to eliminate unnecessary routines and procedural pitfalls (see Rule 1).[3] If Rule 75 is treated as setting forth only the minimum conditions for filing the Statement and the Statement is made obligatory in every case despite the limitation in Rule 75 as to when it is required, it would seem that the purpose of Rule 75 is entirely frustrated. For the assignment of errors was to be eliminated and the Statement to be substituted therefor to the limited extent that some type of assignment served a useful purpose.[4] If, despite the Rule, a Circuit Court requires a Statement of Points even when the entire record is designated, the result will be to reinstate under another name the procedural entanglement which the Rule sought to eliminate. And if obligatory even when the whole record is designated, such Statement would be required without reason or any regard for its rationale; for it is obvious under Rule 75, and has never been doubted by courts or commentators,[5] that the purpose of the Statement is to afford protection to the adversary with respect to his designation of additional parts of the record.

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[3]And see *Mutual Benefit Health and Accident Ass'n. v. Snyder*, 109 F. (2d) 469, 470 (C. C. A. 6, 1940).

[4]See Ilsen & Hone, *Federal Appellate Practice as Affected by the Rules of Civil Procedure*, p. 457, printed in Federal Rules of Civil Procedure, 1947 Revised Edition (West Publishing Co.); and *Mutual Benefit Health and Accident Ass'n. v. Snyder*, cited *supra*, footnote 3, and Sunderland, *loc. cit. supra*, as to the relation between assignments of error and the Statement of Points on Appeal under the Rules.

[5]See Sunderland, *loc. cit. supra*; *Boston & Maine RR. v. Jesionowski*, 154 F. (2d) 703 (C. C. A. 1, 1946); *Ashton v. Town of Deerfield Beach*, 155 F. (2d) 40, 42 (C. C. A. 5, 1946); *Keeley v. Mutual Life Ins. Co. of New York*, 113 F. (2d) 633 (C. C. A. 7, 1940).

(d) Rules of This Court.

Rule 19 of this Court seems entirely consistent and harmonious in purpose and language with Rule 75. This Rule states:

> "(6) The appellant shall, upon the filing of the record in this court, in all cases * * * file with the clerk a concise statement of the points on which he intends to rely on the appeal, and designate the parts of the record which he thinks necessary for the consideration thereof. * * * If parts of the record shall be so designated by one or both of the parties or if such parts be distinctly designated by stipulation of counsel * * * the clerk shall print those parts only; and the court will consider nothing but those parts and the points so stated."

It seems that the provision that "the court will consider nothing but . . . the points so stated" is intended to be modified by the introductory clause, "If parts of the record shall be designated by one or both parties or if such parts be . . . designated by stipulation"—in the same way as that clause modifies the provision that "the clerk shall print those parts only" and "the court will consider nothing but those parts of the record." Indeed, if Rule 19 were construed to mean that the Statement of Points limited the Court's consideration in other cases as well, it would seem to be contrary to the Federal Rules. For to say not only that the Statement of Points is required in all cases but to give it such a drastic effect in all cases, deprives of all force the limitation in the Federal

Rules that the Statement of Points is to be filed "if the appellant does not designate the complete record" and is contrary to Rule 75's entire intendment, as above discussed (*supra,* p. 6). Further, it is clear under the Rule of this Court, as under the Federal Rule, that the purpose of the Statement is to protect the adversary with respect to designation of the record; neither principle, precedent, nor reason can suggest any other function for it. For this Court's Rule, with respect to specification of errors in appellant's brief, fully protects the adversary as to the content of the appellant's argument. As was pointed out in connection with the Federal Rules, "The proper place for an assignment of errors is in the brief in the appellate court."[6] There is no need for the appellee to be informed of the appellant's points prior to the brief except for the purpose of designation of record. Thus, to interpret Rule 19 to mean that the Court is limited to the Statement of Points in its consideration of cases where the entire record is designated would serve no useful purpose and make the Rule merely a procedural trap; such interpretation is contrary to the language as well as to the rationale of the Rule, and to the intent of the Federal Rules of Civil Procedure, in consistency with which the Rules of this Court must be interpreted.[7]

In *Western Nat. Ins. Co. v. LeClare,* 163 F. (2d) 337 (C. C. A. 9, 1947), this Court stated that it need not

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[6]Ilsen & Hone, cited *supra,* footnote 4 at note 375, p. 457.

[7]See footnote 2, *supra.*

consider a point which had not been mentioned in appellant's Statement of Points. However, this decision does not indicate that the provision for limitation of consideration applies when the whole record is designated on appeal, since the Court did not there advert to whether or not the whole record was designated. Furthermore, this Court treated the provision for limited consideration as doing no more, in any case, then establishing a guide for this Court's discretion; for it stated that it had nevertheless "considered them" (the points omitted from the Statement of Points) (163 F. (2d) at p. 340). Finally, a factor further weakening the *Western Nat. Ins. Co.* case as authority for the proposition that the Statement of Points of itself limits this Court's consideration in any type of case, even one where the record is only partially designated, is the fact that this Court there relies upon its decision in *Bank of America Nat. Trust and Savings Ass'n. v. Commissioner,* 126 F. (2d) 48 (C. C. A. 9, 1942). In the latter case, the Statement of Points is a very minor factor among several, which, taken together, were deemed by this Court to indicate that it should not consider a point raised in argument; this Court there emphasized actual elements of prejudice and laches, rather than the Statement of Points, as the basis for its refusal to consider the point (see 126 F. (2d) at p. 52). Thus, it would appear that the instant case is the most extreme application that Rule 19 (6) has had, and that the instant application is unprecedented in its severity.

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In any event, the provision for limited consideration could hardly be considered to impose an absolute limit on this Court's jurisdiction, but is to be deemed merely a guide to its discretion; this interpretation of the Rule is borne out by the *Western Nat. Ins. Co.* case, as discussed above. In the case at bar, as has been clearly shown, the appellee was in no way prejudiced by the appellant's statement, assuming though not conceding, that the statement did not cover the issue of statutory interpretation. Rather the appellee was at all times aware that this was one of the major issues of the case and conducted the case on that basis. If the provision for limited consideration had any applicability to this case, despite the designation of the entire record, it was certainly waived by all participants. See *Ashton v. Town of Deerfield Beach,* cited *supra,* footnote 5, where it was held that even when the entire record was not designated, a question which was not specified in the Statement could and should be considered by the appellate court since appellee did not claim the record was incomplete with respect to the question. Furthermore, assuming any deficiency in the Statement, it is perfectly understandable, in the light of Rule 75 (d), Federal Rules of Civil Procedure, why counsel for appellant considered, as did also counsel for appellee, that all points raised in the briefs and reflected in the record would be passed upon by the Court.

Accordingly, if the provision for limited consideration has any application where the entire record is designated,

we submit that it would be an abuse of discretion to invoke it here where there is no prejudice from any possible deficiency in the Statement and any such deficiency was, moreover, excusable. Compare *Keeley v. Mutual Life Ins. Co.,* cited *supra,* footnote 5; *Drybrough v. Ware,* 111 F. (2d) 548 (C. C. A. 6, 1940).[8]

It is submitted that there is nothing in the Rules of this Court which limits this Court's power and duty to consider the major issue of this case; *i. e.,* the proper interpretation of "the principles of the Constitution" within the meaning of the naturalization law, and that this Court should therefore carry out its responsibility to consider this issue.[9]

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[8]Even in the cases where the Statement is required under the Federal Rule, the failure to file is not jurisdictional and does not necessitate dismissal of the appeal. See *Ilsen & Hone,* cited *supra,* footnote 4, at note 375. In the instant case there is at the least grave doubt as to whether the Rules of this Court require the Statement; and this Court's refusal to consider appellant's major argument is comparable, in its prejudicial effect on the appellant, to dismissal of his appeal.

[9]It may also be noted that this Court seemed to ignore the fact that appellant's petition was filed under Sec. 310 of the Nationality Act of 1940, 8 U. S. C. 710, which sets up a special residence requirement for spouses of American citizens; and treats it as an obvious conclusion, though this position was never advanced by appellee, that appellant must fulfill the showing of five years attachment required by Sec. 307 of the Nationality Act of 1940, 8 U. S. C. 707.

II.

The Question of the District Court's Error in Interpreting the "Principles of the Constitution" Involves Serious and Important Issues and Consequences, and Thus Requires the Consideration of This Court.

Appellant has argued in his main and reply briefs that the District Court's interpretation of the "principles of the Constitution" is contrary to controlling decisions of the United States Supreme Court. To take this argument at its very least, it seems clear that there is a serious question as to the validity of the District Court's interpretation under the Supreme Court's rulings. Thus, the District Court's decision involves an important question of law which this Court has not considered.

In essence appellant's argument is that the District Judge erected his own social and economic beliefs into a principle of the Constitution, contrary to the Supreme Court's interpretations of those principles. If this is true, the affirmance of the District Court's judgment has serious detrimental consequences; it allows District Judges to substitute their personal beliefs for the law of the land and does a grave disservice to the country by permitting them to bar from citizenry aliens who would be entirely acceptable under the law but are not favored by the particular District Judge. And in view of the high importance of citizenship to any alien, and to appellant in particular, an affirmance of the District Court's judgment, if it is based, as contended, on a misconception of the principles of the Constitution, involves a gross mis-

carriage of justice by denying to appellant what is rightfully his. For all these reasons this Court should consider the correctness of the District Court's interpretation of principles of the Constitution.

Conclusion.

The petition for rehearing should be granted. If this Court continues to believe that the Statement of Points on Appeal constitutes in any way an interference with this Court's power and duty to consider the District Court's error as to the meaning of "the principles of the Constitution," we respectfully move that leave to amend such Statement be granted together with this petition.

Respectfully submitted,

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Certificate of Counsel.

I hereby certify that in my judgment this Petition for Rehearing is well founded and that it is not interposed for delay.

Fred Okrand.